Supreme Court, U. S.
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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-440

COUNTY OF SONOMA, EUGENE D. WILLIAMS, individually and in his official capacity as County Clerk, MABEL TONKIN, individually and in her official capacity as Clerk of Municipal Court, HERB SNYDER, individually and in his official capacity as County Recorder, VICTOR MARTINEZ, individually and in his official capacity as Head of the Collections Department
Petitioners

v.

EVA ISBELL, CLEVIE PEARSON and OMEGA PEARSON,
Respondents

PETITION FOR WRIT OF CERTIORARI
to the California Supreme Court

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Dated: September 11, 1978.

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v.

EVA ISBELL, CLEVIE PEARSON and OMEGA PEARSON,
Respondents

PETITION FOR WRIT OF CERTIORARI
to the California Supreme Court

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the California Supreme Court which was entered in this proceeding on June 15, 1978. This action was originally brought by Eva Isbell and Clevie and Omega Pearson against the County of Sonoma, Eugene D. Williams, individually and in his capacity as County Clerk, Mabel Tonkin, individually and in her capacity as Clerk of the Municipal Court, Herb Snyder, individually and in his

official capacity as County Recorder, and Victor Martinez, individually and in his official capacity as head of the County Collections Department.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 21 Cal.3d 61 (1978). Modification of the opinion upon denial of rehearing is reported at 21 Cal.3d 561(a) (1978). The opinion is printed in the Appendix at page A-1. The Modification is printed in the Appendix at page A-25.

JURISDICTION

The decision of the California Supreme Court was entered on June 15, 1978 with a modification of opinion on denial of a rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the California confession of judgment statute is violative of the Fourteenth Amendment to the United States Constitution on its face or as applied to the facts in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the California confession of judgment statute. The statute may be found in West's California Code of Civil Procedure §§ 1132 to 1134 (1972 & Supp. 1978). The sections provide as follows:

§ 1132. *Entry of judgment; obligations for which judgment may be confessed; exception for consumer transactions; conditions*

(a) A judgment by confession may be entered without action either for money due or to become due, or to

secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts.

(b) When the debt or liability arises out of the sale of goods or services primarily for personal, family, or household use, or a loan or other extension of credit for personal, family or household purposes, or a claim involves a promissory note which is based upon such a sale or loan or other extension of credit, such judgment by confession shall be entered only if an attorney independently representing the defendant signs a certificate that he has examined the proposed judgment and has advised the defendant with respect to the waiver of rights and defenses under the confession of judgment procedure and has advised the defendant to utilize the confession of judgment procedure. The certificate shall be filed with the filing of the statement required by Section 1133.

§ 1133. *Defendant's written statement; form*

Statement in Writing and Form Thereof. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must authorize the entry of judgment for a specified sum;

2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due;

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.

§ 1134. *Defendant's written statement; filing; entry of judgment; costs; judgment roll*

In all courts the statement must be filed with the clerk of the court in which the judgment is to be entered, who must endorse upon it, and enter a judg-

ment of such court for the amount confessed with the costs hereinafter set forth. At the time of filing, the plaintiff shall pay as court costs which shall become a part of the judgment the following fees: in superior courts fifteen dollars ($15) and in municipal courts and justice courts ten dollars ($10). No fee shall be collected from the defendant. No fee shall be paid by the clerk of the court in which said confession of judgment is filed for the law library fund nor for services of any court reporter. The statement and affidavit, with the judgment endorsed thereon, becomes the judgment roll.

This case also involves Section 1 of the Fourteenth Amendment of the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an action for declaratory relief brought by respondents Eva Isbell and Clevie and Omega Pearson for a declaration as to the constitutionality of those portions of the California confession of judgment statute related to non-consumer transactions. West Cal. Code Civ. Pro. §§1132(a), 1133 and 1134 (1972 & Supp. 1978)

This case was submitted to the trial court on stipulated facts which appear in full in the Appendix at pages A-27-A-29. In brief, respondent Isbell was charged in 1966 with a violation of the California statute which makes it a crime to make a false representation in order to obtain welfare. West Cal. Welfare and Inst. Code § 11482 (1972). She plead

guilty and was serving her sentence in the county jail when she signed a confession of judgment for the amount of the claimed welfare overpayment.[1] Judgment was entered January 27, 1967. The judgment became a lien against a house Isbell purchased in 1974. In February, 1966, respondents Clevie and Omega Pearson signed a confession of judgment in the amount of welfare overpayments which the Sonoma County Welfare Department claimed had been made to them.[2] Judgment was entered on February 16, 1966. The County subsequently attempted to collect on the judgment.

After taking the case under submission on the stipulated facts, the trial court upheld the constitutionality of the statutory confession of judgment procedure, as did the California Court of Appeal.

The California Supreme Court divided on the question of facial constitutionality of the statute. The majority held that the confession procedure violated the due process guarantees of the Fourteenth Amendment to the United States Constitution. The court's decision was based solely on the United States Constitution and made no reference to the California Constitution.

REASONS FOR GRANTING THE WRIT

Introduction

In this case the California Supreme Court invalidated the major portion of the California confession of judgment

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[1] A copy of the Isbell confession of judgment appears in the Appendix at page A-30.

[2] A copy of the Pearson confession of judgment appears in the Appendix at page A-31.

statute solely on the grounds that it violates the due process clause of the Fourteenth Amendment. The California court reached this conclusion despite this Court's decision in *D. H. Overmyer Co.* v. *Frick Company,* 405 U.S. 174 (1972) that cognovit clauses are not per se violative of due process. The California decision raises serious questions as to the rights of debtors to settle claims against them and as to the degree to which judicial participation in the resolution of those disputes is necessary. As the dissenting opinion states:

> The majority's holding of facial unconstitutionality conflicts with the latest expressions of the United Supreme Court on the subject, and has the unfortunate (and wholly unnecessary) effect of invalidating even those confessions executed by willing and knowledgeable debtors for the purpose of avoiding unnecessary litigation over matters already in controversy. Appendix at page A-17.

In addition, conflict among the lower courts exists with respect to issues raised in this case. Respondents contend that Fourteenth Amendment due process requires a prejudgment hearing on the validity of a waiver embodied in a confession of judgment and that the burden of proof at such a hearing should be on the creditor. The lower courts have reached conflicting conclusions as to whether, as petitioners contend, *D. H. Overmyer Co.* v. *Frick Company, supra,* precludes such contentions.

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1. The Decision Below Conflicts With the Decision of This Court Which Holds that a Confession of Judgment Is Not per se Unconstitutional

The California Supreme Court's decision in this case is in direct conflict with this Court's holding in *D. H. Overmyer Co.* v. *Frick Company, supra.* In *Overmyer,* the Court

upheld the validity of a judgment entered on a cognovit containing a warrant of attorney.[3] Each of the parties to the action were business entities represented by counsel. The cognovit was a result of negotiations between the parties after a failure by Overmyer to make payments to Frick under a construction subcontract. The Court held that a debtor could validly waive its rights to prejudgment notice and hearing and that Overmyer had in fact knowingly, voluntarily, and intelligently executed the instrument containing the cognovit clause. Overmyer's challenge to the facial constitutionality of a cognovit was rejected. The Court stated: "Our holding necessarily means that a cognovit clause is not, per se, violative of Fourteenth Amendment due process." 405 U.S. at 188.

The Court clearly stated that cognovits are to be treated on a case by case basis:

> Overmyer could prevail here only if the clause were constitutionally invalid. The facts of this case, as we observed above, are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack. . . . Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is

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[3]There are generally three types of confessions of judgment or cognovits. The first is a confession of liability prepared after service of process. The second is a confession of judgment executed before service of process but after an actual controversy has arisen between the parties. It waives notice and hearing. The third is incorporated in a contract or other legal document and confesses judgment in advance of a legal controversy. It usually contains a consent to jurisdiction, a waiver of notice and hearing, and a warrant of attorney authorizing judgment. *See,* Note, Cognovit Revisited: Due Process and Confession of Judgment, 24 Hast.L.J. 1045-1046 (1973). *Overmyer* involved the third type of cognovit, but in this case the challenge is to the second type.

> one of adhesion, where there is great disparity in bargaining power, and where the debtor received nothing for the cognovit provision, other legal consequences may ensue. 405 U.S. at 188-189.

Despite this Court's clear pronouncement in *Overmyer* that confessions of judgment are not per se unconstitutional, the California Supreme Court held the state's statute governing confessions of judgment invalid on its face based on the due process clause of the Fourteenth Amendment. In doing so, the court struck down a statute which contains safeguards not found in traditional cognovits. The California statute although authorizing a confession of judgment either before or after service of summons, requires that the confession include a statement in writing, signed by the debtor, setting forth the facts out of which the obligation arose. West Cal. Code Civ. Pro. § 1133 (1972). The statute does not authorize a warrant of attorney. West Cal. Code Civ. Pro. § 1133 (1972); *Hulland* v. *State Bar,* 8 Cal.3d 440, 503 P.2d 608, 105 Cal.Rptr. 152 (1972).

In reaching its decision, the California court relied on authorities which discuss the problem of confessions of judgment in the context of consumer transactions.[4] As

[4]The California court's discussion appears in the Appendix at pages A-7 through A-9. The focus of the Comment cited in 70 Columbia Law Review, 118 1130-31 (1970) is on the use of cognovits by lenders and installment sellers. Appendix at page A-7. The article in the Illinois Bar Journal concerns the use of a cognovit in consumer credit buying. Pyes, *Reappraisal of a Confession of Judgment Law* 48 Ill. Bar J. 764, 769 (1969). Appendix at page A-9. The research supporting Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit,* 29 U.Chi.L.Rev. 111 (1961) is based on the financial industry. *Id.* at 114. The court cited footnote 116 of page 138 with reference to the definition of adhesion contracts. The definition refers specifically to documents drafted *unilaterally.* The confessions of judgment at issue here were clearly not drafted unilaterally. Appendix at page A-7.

a result, the court came to the conclusion that cognovits lend themselves to overreaching and adhesion contracts. However, this case does *not* involve a consumer transaction. The confessions of judgment were neither contained in an adhesion contract nor executed in advance of a controversy. Yet, the California court after analyzing cases and commentaries concerning consumer actions declared the statute unconstitutional on its face.[5]

The decision was reached in clear violation of this Court's conclusion in *Overmyer* that confessions of judgment must be analyzed on a case by case basis. Petitioners do not dispute that it is possible for individual confessions of judgment to be invalid, especially when they are entered into in advance of a controversy and as part of an adhesion contract, but deficiencies in individual cases should not serve to invalidate the statute as a whole.

The cases cited by the court as evidencing the abuses that arise from the use of a cognovit clause give no more support to its conclusion than do the commentaries. The cases cited by the court deal with the use of a cognovit in consumer type transactions: *Virgin Islands National Bank* v. *Tropical Ventures, Inc.* 358 F.Supp. 1272 (D.V.I. 1973) (loan transaction); *Scott* v. *Danaher,* 343 F. Supp. 1272 (N.D.Ill. 1972) (installment sales contract); *Swarb* v. *Lennox,* 314 F.Supp. 1091 (E.D.Pa. 1970) (holding restricted to judgment arising in a consumer or consumer financing transaction); *See, Osmond* v. *Spence,* 327 F.Supp. 1349 (D.Del. 1971) (the subsequent history of *Osmond* is discussed *infra,* at page 12.) The only other case on which the court relied is *Hulland* v. *State Bar,* 8 Cal.3d 440, 503 P.2d 608, 105 Cal.Rptr. 152 (1972). However, as the dissenting opinion points out, *Hulland* involved an attempt by an attorney, who owes a fiduciary duty to his client, to have his client confess judgment for the attorney's fees in advance of an actual controversy.

[5]Because it found the statute unconstitutional on its face, the majority of the California court did not analyze the specific facts in this case to determine whether the respondents validly waived their rights to notice and hearing. However, the dissenting opinion agreed with the California court of Appeal that "there is not a scintilla of evidence that they did not knowingly, intelligently and voluntarily waive their due process rights." Appendix at page A-18.

The California decision overlooks the fact that the statute authorizes confessions of judgment in commercial and nonconsumer situations and that the statute severely constrains the use of confessions in consumer transactions. Their use is prohibited by licensees under the California small loan law and licensees under the personal property broker law. West Cal. Fin. Code §§ 24468 and 22467 (1968). Moreover, the California legislature, perhaps taking note of this Court's pronouncement in *Swarb* v. *Lennox*, 405 U.S. 191, 202 (1972) that "problems of this kind are peculiarly appropriate grist for the legislative mill," afforded protection to consumers by amending the confession of judgment statute in 1975, while this case was pending. West Cal. Code Civ. Pro. § 1132(b) (Supp. 1978). The amended section provides that in any sale or loan primarily for personal, family, or household use, there is a separate confession of judgment procedure which allows confession of judgment only if an attorney independently representing the defendant certifies that he has advised the defendant with respect to the waiver and has recommended the use of the confession of judgment procedure.[6]

Given that the consumer cognovit is not even at issue in this case, the California court's reliance on perceived abuses in that area to invalidate the state statute violates the dictate of *Overmyer* that each cognovit must be analyzed on its facts. As the dissenting opinion so aptly states: ". . . in a situation calling for use of a surgeon's scalpel, the majority reaches for a meat axe." Appendix at page A-17.

Overmyer clearly stands for the proposition that the scalpel, not the meat axe, is the appropriate tool.

[6]The California court did not purport to find § 1132(b) unconstitutional.

2. There Is a Conflict Between the Lower Courts on the Proper Application of Overmyer v. Frick

Throughout this case the respondents have contended that the California confession of judgment statute violates due process because it does not provide for a hearing prior to entry of judgment. In *Overmyer* v. *Frick, supra,* the Court held that confessions of judgment are not unconstitutional per se and that a debtor may validly waive his rights to notice and hearing and to present a defense on a note. In both *Overmyer* and its companion case of *Swarb* v. *Lennox, supra,* the Court encountered confession of judgment statutes which did not provide for prejudgment hearing on the validity of the waiver. Despite the fact that these statutes did not provide for a prejudgment hearing, lower courts are divided as to whether such a hearing is required.

The clash between the lower courts is evident in the decision of the three-judge federal district court in *Tunheim* v. *Bowman,* 336 F.Supp. 1392 (D.Nev. 1973). *Tunheim* involved a challenge to the constitutionality of Nevada's confession of judgment statutes. Plaintiffs alleged that the failure of the statute to provide for notice and hearing prior to judgment rendered them unconstitutional. The court dissolved the three-judge panel holding that prior controlling decisions rendered insubstantial any claim that the Nevada statutes were unconstitutional. The court stated:

> The allegation that the Nevada confession of judgment statutes are on their face unconstitutional because they do not incorporate a requirement of prior notice and hearing before judgment is entered falls before the decision of the Supreme Court in *D. H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124. . . . The *Overmyer* case specifically holds that statutes legalizing cognovit clauses without a requirement of prior notice and hearing are not per se unconstitutional

under the due process clause of the Fourteenth Amendment. 366 F.Supp. at 1393-1394.

The court went on to reject the interpretation of *Overmyer* made by a federal district court in Delaware in a series of opinions beginning with *Osmond* v. *Spence,* 327 F. Supp. 1349 (D.C. Del. 1971). In *Osmond,* a three-judge federal court held that Delaware's confession of judgment statutes were unconstitutional because they did not provide prejudgment notice and hearing. On appeal, this Court ordered the case remanded in light of *Swarb* and *Overmyer.* 405 U.S. 971 (1972). On remand, the trial court maintained its original opinion that notice and hearing were required prior to entry of judgment. 359 F.Supp. 124 (D.C. Del. 1972).[7] The *Tunheim* court disagreed with this interpretation of *Overmyer*:

> The *Overmyer* case did not leave the question open. It specifically held that a statutory scheme which does not provide for notice and hearing prior to entry of a confessed judgment did not run afoul of due process requirements. 366 F.Supp. at 1394.

The Maryland Court of Appeals holds a view similar to that expressed in *Tunheim*:

> In any event, *Overmyer* cannot be read to mandate a 'waiver hearing' prior to entry of a confessed judgment and, insofar as one may be required thereafter, it was clearly available to appellants at the hearing on their motion to vacate. No more is required. *Billingsley* v. *Lincoln National Bank,* 271 Md. 683, 693; 320 A.2d 34, 39 (1974)

In accord with *Tunheim* and *Billingsley* are the decisions in *Irmco Hotels Corp.* v. *Solomon,* 27 Ill.App.3d 225, 326 N.E.2d 542 (1975); *Star Finance Corp.* v. *McGee,* 27 Ill.App.

[7]No further appeal was taken.

3d 421, 326 N.E.2d 518 (1975); and *Buckner* v. *Carmack,* 272 So.2d 326 (La. 1973) *appeal dismissed,* 417 U.S. 901 (1974). In contrast, *Virgin Islands National Bank* v. *Tropical Ventures, Inc.,* 358 F.Supp. 1203 (D.V.I. 1973) and *Scott* v. *Danaher,* 343 F.Supp. 1272 (N.D. Ill. 1972) (decided prior to *Overmyer*) are in accord with *Osmond* v. *Spence, supra.*

In addition to the conflict with respect to the necessity of a prejudgment hearing, lower courts also disagree as to the proper allocation of the burden of proof in a proceeding challenging the debtor's waiver. *Compare, Osmond* v. *Spence, supra,* at 127 *with Virgin Islands National Bank* v. *Tropical Ventures, Inc., supra,* at 1207 and *Irmco Hotels Corp.* v. *Solomon, supra.* The majority opinion of the California court adopts the view of *Osmond,* which assigns the burden to the creditor, while the minority follows *Virgin Islands National Bank* and *Irmco* in allocating the burden to the debtor.

The conflicting interpretations of *Overmyer* made by the lower courts as to the necessity of a prejudgment hearing and the appropriate allocation of the burden of proof illustrate the importance of this case in resolving the constitutional requirements of due process within the context of the confession of judgment.

3. The Decision of the California Supreme Court Will Have Serious Consequences for Commerce and the Courts

The decision of the California Supreme Court threatens serious consequences for the commercial system. Its implications for the country's legal system are equally portentous. The court mistakenly assumes that confessions of judgment are employed only in consumer transactions, and

despite the facts in the case before it, only in advance of an actual controversy. This case does not involve a consumer transaction and the consequences of the decision for informed parties in the world of commerce acting with full understanding of their rights is extremely deleterious. Moreover, the resulting burden on the courts if the decision of the California court stands could prove substantial if the result of the decision is to make it impossible for parties to settle their differences short of litigation.

The decision severely restricts remedies available to creditors but also in many respects limits debtors' remedies. The debtor who may desire to resolve obligations through the straightforward means of a confession of judgment is foreclosed from doing so by the decision. The decision infringes on the rights of both parties to settle disputes without resort to the time, expense, and publicity of litigation. As the facts in *Overmyer* illustrate so well, there is a place in the world of commerce for confessions of judgment. Knowledgeable parties should not be foreclosed from freely using an expeditious procedure to resolve controversies.

It is not even clear if judicially significant remedies are available to parties to a dispute short of actual litigation. For example, is a stipulated judgment suspect where one of the parties is unrepresented by counsel? A default judgment often does not differ in substantial respects from a confession of judgment executed after a dispute has arisen. What is the constitutional status of this procedure after the California court's decision?

The doctrine advanced in this case suggests court hearings, or at a minimum, proceedings in which attorneys for both parties are present, should be required for any judicially significant settlement of a dispute no matter how well informed the parties might be. In addition to creating

an added and unnecessary workload for the courts, this doctrine is profoundly paternalistic. It assumes that citizens are incapable of conducting their financial affairs without the intervention of the judicial system. It also contradicts the holding in *Overmyer* that a debtor may constitutionally waive rights to notice and hearing. 405 U.S. at 188.

Public policy should encourage citizens to resolve disputes independently if possible. This is what the procedure struck down by the California Supreme Court a"ows. Case by case analysis and review of confessions of judgment is available to protect individual debtors. This procedure allows citizens to take responsibility for their own financial affairs without unnecessary and paternalistic intervention by the courts, while still affording judicial review for the individual unknowing debtor.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the California Supreme Court.

Respectfully submitted,

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(Appendix Follows)

Appendices

Appendix

[21 Cal.3d 61]

[S.F. No. 23604. Apr. 24, 1978.]

EVA ISBELL et al., Plaintiffs and Appellants, v.
COUNTY OF SONOMA et al., Defendants and Respondents.

OPINION

TOBRINER, J.—(1a) Under the due process clause of the federal Constitution, a court may enter judgment against a defendant only if the record shows that either (a) the defendant has received notice and an opportunity to be heard, or (b) the defendant has voluntarily, knowingly and intelligently waived his constitutional rights. The California confession of judgment statutes (Code Civ. Proc., §§ 1132-1135), however, direct the court clerk in nonconsumer cases to enter judgment on the basis of the signed confession without notice and hearing. We shall explain that a signed confession of judgment is not adequate proof that the debtor has validly waived his due process rights; rather than emerging from negotiations between knowledgeable bargainers, such confessions are most often executed by debtors who have little understanding of the significance of their waiver and little choice in the matter. Because the California statutes provide insufficient safeguards to assure that the debtor in fact executed a voluntary, knowing, and intelligent waiver, and because the debtor's opportunity to seek post-judgment relief does not cure the unconstitutionality of a judgment entered without a valid waiver, we conclude that the confession of judgment procedure established in sections 1132 through 1135 violates the due process clause of the Fourteenth Amendment.

1. *Summary of facts.*

Although confessions of judgment are usually employed to enforce claims of private creditors, the instant action presents perhaps a more doubtful usage. In 1966 and 1967, each of the plaintiffs was a Sonoma County welfare recipient.[1] Plaintiff Isbell pleaded guilty to welfare fraud and was sentenced to 30 days in jail. Because the court did not order restitution, a county representative visted Isbell at the jail on January 27, 1967, and induced her to execute a confession of judgment for the alleged overpayment, $596.98 "plus medical to be determined." The county filed this document with the clerk of the municipal court, which then issued a judgment against Isbell. The county recorded an abstract of the judgment; thus when Isbell purchased a house in 1974, the judgment became a lien on that realty.

Although plaintiffs Clevie and Omega Pearson were not charged with a criminal offense, the county claimed their alleged misuse of trust funds rendered such funds additional income to the Pearsons, and thus that the Pearsons had received excess welfare payments. On February 8, 1966, the Pearsons, at the behest of a county representative, executed a confession of judgment for $193, the amount of the alleged overpayment.[2] The county filed this document with

[1]The parties submitted the case for decision upon stipulated statements pursuant to Code of Civil Procedure section 1138. This section provides that "Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which would have jurisdiction if an action had been brought. . . . The Court must thereupon hear and determine the case, and render judgment thereon, as if an action were depending."

[2]Both Isbell and the Pearsons executed a confession of judgment form furnished by the County. This form provides: "I hereby confess judgment in favor of the County of Sonoma, the plaintiff above named, for the sum of $——, and authorize entry of judgment thereof against me. This judgment applies to any personal and real property I now own or may acquire. [¶] This confession of judgment is for a debt justly due from me to the said County of Sonoma, and arises upon the following facts: to wit ——————."

the municipal court clerk, who entered judgment for the confessed sum on February 16, 1966. The county subsequently recorded an abstract of the judgment and has attempted to collect the judgment debt.

Neither Isbell nor the Pearsons were advised by counsel before signing the confessions of judgment. The parties have stipulated that plaintiffs "are lay persons with no training or background in matters of law and have only a lay person's understanding of the legal consequences of a confession of judgment." The parties finally stipulated that "There is an actual and present controversy between plaintiffs and defendants. Plaintiffs contend that the California laws authorizing and governing confession of judgment are unconstitutional, but defendants deny and dispute this."

On the basis of the stipulated facts, without receiving additional evidence, the trial court entered a declaratory judgment holding that a confession of judgment obtained in conformity with Code of Civil Procedure sections 1132 to 1135 did not violate due process, and consequently that the judgments rendered to the county against plaintiffs are valid. Plaintiffs appeal from that judgment.

2. *A judgment based solely upon an executed confession is constitutionally defective because that confession is insufficient to demonstrate that the debtor has voluntarily, knowingly, and intelligently waived his due process rights.*

The striking feature of the confession of judgment at common law lies in its authorization for entry of final judgment against a debtor without notice, hearing, or opportunity to defend. As we explained in *Hulland* v. *State Bar*

(1972) 8 Cal.3d 440, 449 [105 Cal.Rptr. 152, 503 P.2d 608]: "a confession of judgment . . . puts at the disposal of the creditor the most drastic of enforcement proceedings. [It] forecloses the presentation of any possible defense or controversy for judicial resolution; to the contrary it is a personal admission of a debt obligation upon which the court places its primatur." The New York Court of Appeals described confessed judgments as " 'the loosest way of binding a man's property that ever was devised in any civilized country.' " (*Atlas Credit Corporation* v. *Ezrine* (1969) 25 N.Y.2d 219 [303 N.Y.S.2d 382, 250 N.E.2d 474, 478], quoting *Alderman* v. *Diamet* (1828) 7 N.J.L. 197, 198.)

California's confession of judgment statutes, enacted in 1851 and codified in 1872, follow common law practice with the notable exception that they do not permit an attorney to confess judgment on behalf of the defendant. (See *Barnes* v. *Hilton* (1953) 118 Cal.App.2d 108, 110-111 [257 P.2d 98].) Code of Civil Procedure section 1132, subdivision (a), provides generally that "A judgment by confession may be entered without action either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts." Section 1133 specifies that the confession must be in writing, verified by the defendant, and must state concisely the facts constituting the liability.[3] In courts other than justice courts the creditor

[3]Section 1133 reads as follows: "A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

"1. It must authorize the entry of judgment for a specified sum;

"2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due;

should file the judgment with the court clerk, "who must endorse upon it, and enter a judgment of such court for the amount confessed" (Code Civ. Proc., § 1134); in justice courts the confession may be filed with either the judge or the clerk (Code Civ. Proc. § 1135).

In recent years the Legislature has enacted numerous statutes limiting the use of confessions of judgment. The Financial Code prohibits the use of confessions of judgment by industrial loan companies (§ 18673), licensees under the California small loan law (§ 24468), and licensees under the personal property broker law (§ 22467). Civil Code section 1689.12 voids any cognovit provision in a home solicitation contract.[4] Finally in 1975 the Legislature added subdivision (b) to Code of Civil Procedure section 1132, providing that in any sale or loan primarily for personal, family, or household use, the clerk may enter judgment on a confession only if an attorney independently representing the defendant certifies that he has advised the defendant with respect to the waiver of rights and defenses and has recommended the use of the confession of judgment procedure.

Plaintiffs, welfare recipients charged with receipt of overpayments, derive no protection from any of the

"3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same."

[4]Civil Code section 1804.1 states that no retail installment sale contract may include "a power of attorney . . . to confess judgment"; section 2983.7 similarly provides that no automobile conditional sales contract may include "a power of attorney . . . to confess judgment." Since Code of Civil Procedure section 1132 does not permit confession of judgment by warrant of attorney in any case (see *Barnes* v. *Hilton, supra,* 118 Cal.App.2d 108, 110-111), it is unclear whether sections 1804.1 and 2983.7 impose any additional restrictions on the use of confessions of judgment.

recent enactments banning or restricting the use of cognovit agreements. The present case falls under the provisions of Code of Civil Procedure sections 1132 through 1135, unaffected by the 1975 amendment. Because these provisions permitted entry of judgment against plaintiffs without a voluntary and knowing waiver, plaintiffs claim the statutes in question are unconstitutional.

It is settled constitutional law that "in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and a hearing." (*Beaudreau* v. *Superior Court* (1975) 14 Cal.3d 448, 458 [121 Cal.Rptr. 585, 535 P.2d 713]; see *Mullane* v. *Central Hanover Tr. Co.* (1950) 339 U.S. 306, 313 [94 L.Ed. 865, 872-873, 70 S.Ct. 652].) Notice and hearing must always precede entry of a final judgment depriving one of property (see *Mathews* v. *Eldridge* (1976) 424 U.S. 319, 333 [47 L.Ed. 2d 18, 32, 96 S.Ct. 893]; *Kash Enterprises, Inc.* v. *City of Los Angeles* (1977) 19 Cal.3d 294, 307 [138 Cal.Rptr. 53, 562 P.2d 1302]); indeed, except in extraordinary circumstances notice and hearing are required before even a temporary deprivation of property. (*Fuentes* v. *Shevin* (1972) 407 U.S. 67, 80-82 [32 L.Ed.2d 556, 569-571, 92 S.Ct. 1983]; *Brooks* v. *Small Claims Court* (1973) 8 Cal. 3d 661 [105 Cal.Rptr. 785, 504 P.2d 1249].) A confession of judgment, as we have explained, purports to authorize entry of judgment without prior notice and hearing. Consequently all courts agree that a judgment entered pursuant to such a confession is constitutional only if the confession constitutes a *valid waiver* of the debtor's due process rights. (See *D. H. Overmyer Co.* v. *Frick Co.* (1972) 405 U.S. 174, 184-188 [31 L.Ed.2d 124, 133-136, 92 S.Ct. 775]; *Tunheim* v. *Bowman* (D.Nev. 1973) 366 F.Supp. 1392; *Scott* v. *Danaher* (N.D.Ill. 1972) 343

F.Supp. 1272; *Irmco Hotels Corp.* v. *Solomon* (1975) 27 Ill.App.3d 225 [326 N.E.2d 542].)

Since the relevant statutes direct the clerk to enter judgment upon the creditor's presentation of a verified confession, the crucial issue becomes whether that document itself demonstrates that the debtor has in fact made a voluntary, knowing and intelligent waiver. In resolving that issue, we are guided by well-established constitutional principles: that waiver of constitutional rights is not presumed (*D. H. Overmyer Co.* v. *Frick Co., supra,* 405 U.S. 174, 186 [31 L.Ed.2d 124, 134]; *Ohio Bell Tel. Co.* v. *Comm'n* (1937) 301 U.S. 292, 307 [81 L.Ed. 1093, 1103, 57 S.Ct. 720]); on the contrary, "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights" (*Johnson* v. *Zerbst* (1938) 304 U.S. 458, 464 [82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 146 A.L.R. 357]; *Scott* v. *Danaher, supra,* 343 F.Supp. 1272, 1277; *Blair* v. *Pitchess* (1971) 5 Cal.3d 258, 274 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206].)

We look first to the question whether the debtor's assent to the confession demonstrates the *voluntary* character of his waiver of due process rights. Cognovit clauses most commonly appear in form contracts dictated by the party with a bargaining advantage. (See 70 Colum.L.Rev. (1970) 1118, 1130-1131; see generally Hopson, *Cognovit Judgments: An Ignored Problem of Due Process and Full Faith and Credit* (1961) 29 U.Chi.L.Rev. 111, 138 fn. 166.) Thus when the United States Supreme Court in *D. H. Overmyer Co.* v. *Frick Co., supra,* 405 U.S. 174, held in the context of a cognovit agreement negotiated between equal bargainers that confessions of judgment were not per se unconstitutional, it added the following caveat: "Our holding . . . is not controlling precedent for other facts of other

cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue." (405 U.S. at p. 188 [31 L.Ed.2d at p. 135].) In *Hulland* v. *State Bar, supra,* 8 Cal.3d 440, we observed that this caveat casts "serious doubt on the constitutionality . . . of cognovit clauses contained in contracts of adhesion, in which there is great disparity in bargaining power and the debtor receives nothing for the cognovit provision." (8 Cal.3d at p. 450; see also *Blair* v. *Pitchess, supra,* 5 Cal.3d at p. 275.)

In *Blair* v. *Pitchess, supra,* 5 Cal.3d at page 275, we discussed an analogous issue involving the validity of a debtor's contractual waiver of his constitutional protection against warrantless entry to seize property claimed by the creditor under a conditional sales contract. Observing that "most of those contracts appear to be adhesion contracts, the terms of which are specified by the seller or lender," we concluded that "a consent obtained in such a contract of adhesion is ineffective to waive the constitutional protections. . . ." (Pp. 275-276.)

By parity of reasoning, the debtor's assent to a contract of adhesion with a cognovit clause, or to a confession of judgment form presented by the creditor, cannot operate as a valid waiver of constitutional rights. But even if the terms of the confession are not dictated by the creditor, the drastic nature of the device—the debtor's advance waiver of all possible defenses and even the right to be notified of the existence of the proceeding—strongly suggests a substantial disparity in bargaining position and implies overreaching on the part of the creditor. Thus except in the rare case in which the cognovit agreement itself shows that it was a negotiated agreement between equal bargainers, as in *D. H. Overmyer Co.* v. *Frick Co., supra,* 405 U.S.

174, a court presented only with the verified confession of judgment cannot assume the voluntariness of any waiver of due process rights implicit in that confession.

The debtor's execution of the confession of judgment equally fails to establish a *knowing* and *intelligent* waiver of constitutional rights. Although the face of the document itself often will not reveal the debtor's lack of legal sophistication, historical experience shows that confessions of judgment are most frequently employed against those who are unaware of the significance of that procedure. (See *Swarb* v. *Lennox* (E.D.Pa. 1970) 314 F.Supp. 1091; Hopson, *op. cit. supra,* 29 U.Chi. L. Rev. 111.) Many courts and commentators have observed that persons who sign confessions of judgment often do not realize that they are not only waiving their rights to notice and hearing, but as well the opportunity of presenting any defense to the claim. (See *Virgin Islands National Bank* v. *Tropical Ventures, Inc.* (D.V.I. 1973) 358 F.Supp. 1203, 1206; *Scott* v. *Danaher, supra,* 343 F.Supp. 1272, 1278; *Osmond* v. *Spence* (D.Del. 1971) 327 F.Supp. 1349, 1359; *Pyes, Reappraisal of the Confession of Judgment Law* (1960) 48 Ill. Bar J. 764, 769.) Thus the debtor's signature on the confession of judgment creates no inference that the debtor knowingly and intelligently waived his due process rights.

Because of the high risk of an involuntary, unknowing and unintelligent waiver, we held in *Hulland* v. *State Bar, supra,* 8 Cal.3d 440, that an attorney could not use a confession of judgment to collect legal fees; we stated that the use of a confession of judgment "creates a situation in which the client's ignorance of legal matters makes it unlikely that he will understand the character and effect of the instrument." (8 Cal.3d at p. 450.) When the Legislature amended Code of Civil Procedure section 1132 to provide that in a consumer transaction the proposed judgment

must be accompanied by the certificate of independent counsel that he has advised defendant of his rights and advised him to sign the confession, it also recognized that these requirements are impelled by predicates of due process of law. As the Attorney General explained, this amendment rests on the rationale that "confessions of judgment are special cases" in which lay knowledge does not adequately ensure a knowing and voluntary waiver. (59 Cal. Ops.Atty.Gen. 432, 438 (1976).)

In sum, sad experience has shown that the confession of judgment procedure lends itself to overreaching, deception, and abuse. Such a confession cannot on its face represent a voluntary, knowing and intelligent waiver.

Defendants point out that some confessions may in fact evidence a voluntary, knowing, and intelligent waiver by the debtor; thus the sufficiency of a confession to justify entry of judgment, they argue, must be determined on a case by case basis. The California statutes, however, do not provide for a case by case determination of the validity of the debtor's waiver. Code of Civil Procedure sections 1133 and 1134 direct the court clerk to enter judgment upon all written confessions which state the amount due and the basis for the debt. The clerk is not a judicial officer (*Lane* v. *Pellissier* (1929) 208 Cal. 590, 593 [283 P. 810]; *People* v. *Kuder* (1928) 90 Cal.App. 594, 600 [266 P. 337]); he has no authority to reject confessions on the ground that they do not adequately prove a constitutionally valid waiver (cf. *Oliphant* v. *Whitney* (1867) 34 Cal. 25, 27; *Rose* v. *Lelande* (1912) 20 Cal.App. 502, 503 [129 P. 599]). In short, the California statutes do not permit a prejudgment judicial determination of the validity of the debtor's waiver, but require the clerk to enter judgment upon a document which is ordinarily insufficient to demonstrate a valid waiver.

Thus a judgment entered pursuant to the California procedure is constitutionally defective.

3. *The debtor's opportunity to seek postjudgment relief does not cure the unconstitutionality of a judgment by confession entered without sufficient proof of a valid waiver of the debtor's due process rights.*

We reject defendants' contention that a debtor's opportunity to attack a confessed judgment by motion filed after entry of judgment is an adequate remedy.[5] In *Payne* v. *Superior Court* (1976) 17 Cal.3d 908, 911 [132 Cal.Rptr. 405, 553 P.2d 565], we observed that "Few liberties in America have been more zealously guarded than the right to protect one's property in a court of law. This nation has long realized that none of our freedoms would be secure if any person could be deprived of his possessions without an opportunity to defend them *'at a meaningful time* and in a meaningful manner.'" (Citing *Fuentes* v. *Shevin, supra,* 407 U.S. 67, 80 [32 L.Ed.2d 556, 570].) (Italics added.)

A postjudgment determination of the validity of the debtor's waiver is not a determination "at a meaningful time." Once judgment has entered, the damage is done; the debtor is now subject to an obligation imposed in violation of his due process rights, and the creditor can immediately employ legal process to enforce that obliga-

[5]We distinguish *Mitchell* v. *W. T. Grant Co.* (1974) 416 U.S. 600 [40 L.Ed.2d 406, 94 S.Ct. 1895] and *Connolly Development, Inc.* v. *Superior Court* (1976) 17 Cal.3d 803 [132 Cal.Rptr. 477, 553 P.2d 637]. Both decisions upheld the constitutionality of statutes permitting a *temporary* taking of specific property in which the creditor claimed an interest without prior notice and hearing. The confession of judgment statutes, in contrast, permit entry of a *final judgment,* pursuant to which the creditor can levy upon *any nonexempt property* of the debtor without notice or hearing or a knowing and intelligent waiver of that right.

tion.[6] Thus as the court explained in *Osmond* v. *Spence, supra,* 359 F.Supp. 124, 127, unless the validity of the waiver is determined "before the judgment is entered, an alleged debtor will be deprived of his due process rights on every occasion when an effective waiver has not occurred."

California's confession of judgment statutes, moreover, do not even provide for a postjudgment determination of the validity of the waiver. The debtor's only remedies are (1) to move to set aside the judgment under Code of Civil Procedure section 473—a remedy available only if, despite the absence of notice, he learns of the judgment and files his motion within six months of entry of judgment—or (2) to act to set aside a judgment procured by extrinsic fraud (see Code Civ. Proc. § 473; *Olivera* v. *Grace* (1942) 19 Cal.2d 570, 575 [122 P.2d 564]). As we pointed out in *Kash Enterprises, Inc.* v. *City of Los Angeles, supra,* 19 Cal.3d 294, 309, "[n]ot one of the scores of recent procedural due process decisions . . . suggests that the availability of a collateral judicial remedy can sustain a . . . procedure" which provides for no judicial determination whatsoever, either before or after the taking.

Defendants do not take issue with the principles and the reasoning which lead us to conclude that a confessed judgment based solely upon the debtor's signature to a cognovit agreement is constitutionally defective, and that

[6]*Osmond* v. *Spence* (D.Del. 1972) 359 F.Supp. 124; *Virgin Islands National Bank* v. *Tropical Ventures, Inc., supra,* 358 F.Supp. 1203. Courts in Illinois and Pennsylvania have reached a slightly different conclusion than stated in the text, holding that the debtor is entitled to a determination of the validity of the waiver before *execution* of judgment. (*Scott* v. *Danaher, supra,* 343 F.Supp. 1272; *Chittester* v. *LC-DC-F Employees of G. E. Fed. Cr. Un.* (W.D.Pa. 1974) 384 F.Supp. 475; *North Penn Consumer Discount Co.* v. *Shultz* (1977) — Pa.Super. — [378 A.2d 1275].)

the debtor's opportunity to seek postjudgment relief does not cure that defect. Instead, defendants argue from precedent, contending that the United States Supreme Court decision in *D. H. Overmyer Co.* v. *Frick Co., supra,* 405 U.S. 174, definitely establishes the constitutionality of the challenged California confession of judgment procedure.

Although defendants seek to equate *Overmyer* and the instant matter, the cases are distinguishable in several relevant respects. First, the Ohio statutory procedure at issue in *Overmyer* provided a debtor with a number of procedural and substantive safeguards unavailable under California procedure. Thus, while in California a debtor receives no notice at the time the confession of judgment is entered so as to permit him to make a speedy attack on the judgment, the Ohio statutes required the court clerk to give a judgment debtor notice of the entry of the confessed judgment. (See 405 U.S. at p. 175, fn. 1 [31 L.Ed.2d at p. 128].) Moreover, whereas California procedure permits a postjudgment attack on a confession of judgment only upon specified procedural grounds, the Ohio procedure enabled a judgment debtor to overturn a confessed judgment whenever the debtor could show the existence of a valid defense on the merits. (See 405 U.S. at p. 188 [31 L.Ed.2d at pp. 135-136]; see also *Billingsley* v. *Lincoln National Bank* (1974) 271 Md. 683 [320 A.2d 34]; *Irmco Hotels Corp.* v. *Solomon, supra,* 326 N.E.2d 542.) Consequently, the statutory procedure upheld in *Overmyer* was not nearly as harsh in operation as the California procedure at issue here.

Second, and perhaps more significantly, the *Overmyer* decision nowhere addresses the issue, crucial to the present case, whether the Ohio statutes established a constitutionally adequate procedure for assuring that a valid waiver of constitutional rights had occurred. In *Overmyer*

the judgment debtor did not attack the adequacy of the record, but instead broadly claimed that an individual could never validly waive all rights to notice and hearing through a confession of judgment agreement. The *Overmyer* decision went no further than to reject this broad proposition and to hold on the facts before it that D. H. Overmyer Co., a large corporation which entered into a negotiated cognovit agreement in return for valuable consideration, had "voluntarily, intelligently and knowingly" waived its constitutional rights. (405 U.S. at p. 187 [31 L.Ed.2d at p. 135]; see *Swarb* v. *Lennox,* 405 U.S. 191, 201-202 [31 L.Ed.2d 138, 146-147, 92 S.Ct. 767].)

Since it is axiomatic that "cases are not authority for propositions not considered therein" (*Worthley v. Worthley* (1955) 44 Cal. 2d 465, 472 [283 P.2d 19]), we conclude that *Overmyer* did not resolve that a confession of judgment procedure which requires the entry of judgment without a sufficient showing of a valid waiver is consonant with due process. (See *Osmond* v. *Spence, supra,* 359 F.Supp. 124; *Virgin Islands National Bank* v. *Tropical Ventures, Inc. supra,* 358 F.Supp. 1203; cf. *Scott* v. *Danaher, supra,* 343 F.Supp. 1272; but see *Tunheim* v. *Bowman, supra,* 366 F.Supp. 1392; *Irmco Hotels Corp.* v. *Solomon, supra,* 326 N.E.2d 542; *Billingsley* v. *Lincoln National Bank, supra,* 320 A.2d 34.) *Overmyer* therefore does not conflict with our conclusion that the California confession of judgment procedure is constitutionally infirm.

4. *Our holding that the California confession of judgment procedure is constitutionally defective should be given limited retroactive effect.*

Having concluded that the California confession of judgment procedure is constitutionally defective, we hold that after this decision becomes final no court may enter a

confessed judgment pursuant to that procedure.[7] A question remains, however, as to the application of this decision to judgments entered prior to the finality of this opinion. As we explained in *Li* v. *Yellow Cab Co.* (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393], no hard and fast rules determine the extent to which a decision is given retroactive effect; "determinations of this nature turn on considerations of fairness and public policy." (13 Cal.3d at p. 829).

Such considerations of fairness and public policy militate against a fully retroactive application of the present decision. Although confessions of judgment have not found widespread use in California (see *Barnes* v. *Hilton, supra,* 118 Cal.App.2d 108, 111), judgments were entered pursuant to that procedure, some of venerable age. In many of such cases the debtor owed the debt; in some the creditor has probably by this date collected all or part of the judgment. Little would be gained, and much confusion engendered, by a decision which would automatically void all such judgments. (Cf. *In re Marriage of Brown* (1976) 15 Cal.3d 838, 850-851 [126 Cal.Rptr. 633, 544 P.2d 561].)

On the other hand, many of those existing judgments may well have been entered without a valid waiver of the debtor's constitutional rights; and in some cases the debtors, believing they have a defense to the underlying obligation, may seek to reopen those proceedings. We therefore believe that our decision should be given a limited retroactive application to permit any judgment debtor to apply for a hearing challenging the validity of the waiver in his confession of judgment. At such a hearing the creditor,

[7]Since the instant case does not involve a consumer transaction within the scope of Code of Civil Procedure section 1132, subdivision (b), we do not here decide the constitutionality of judgments entered pursuant to that provision.

who must overcome the presumption against waiver of constitutional rights, bears the burden of proving the validity of the waiver;[8] if he fails to sustain the burden the court must vacate the judgment.

Finally, as in *Li* v. *Yellow Cab Co., supra,* 13 Cal.3d 804, we conclude that the litigants before the court should be given benefit of our decision holding a judgment based on a confession invalid, in order "to provide incentive in future cases for parties who may have occasion to raise 'issues involving renovation of unsound or outmoded legal doctrine.' " (13 Cal.3d at p. 830.)

The judgment is reversed and the cause remanded with directions to enter a declaratory judgment in favor of plaintiffs determining that the confession of judgment procedure of Code of Civil Procedure sections 1132, subdivision (a), 1133, 1134 and 1135 does not conform to the due process standards of the Fourteenth Amendment to the United States Constitution, and further determining that

[8]Courts of other jurisdictions have disagreed as to whether the debtor or the creditor bears the burden of proof in a postjudgment hearing concerning the validity of the debtor's waiver. (Cf. *Osmond* v. *Spence, supra,* 359 F.Supp. 124, 127 with *Virgin Islands National Bank* v. *Tropical Ventures, Inc., supra,* 358 F.Supp. 1203 and *Irmco Hotels Corp.* v. *Solomon, supra,* 326 N.E.2d 542.) We believe this issue was correctly resolved in the Court of Appeal opinion below, and therefore adopt that court's language, which stated that: "In *Blair* v. *Pitchess, supra,* 5 Cal.3d 258 at page 274, the Supreme Court held that "Where government officials rely on consent to justify the lawfulness of a search, the burden is on them to show by clear and positive evidence that the consent was freely, voluntarily and knowledgeably given.' . . . Although *Blair* involved the waiver of Fourth Amendment rights, its rationale is nevertheless controlling here. Due process rights are no less fundamental than the Fourth Amendment protection against unreasonable searches and seizures, and the presumption against waiver is equally applicable to the constitutional guarantee of notice and hearing. Thus where a creditor relies upon waiver of due process rights, he should be charged with proving that the waiver was valid."

the judgment entered against plaintiff Isbell on January 27, 1967 and the judgment entered against plaintiffs Pearson on February 16, 1966, are void.

Bird, C. J., Mosk, J., and Thompson (Homer B.) J.,* concurred.

RICHARDSON, J.—I respectfully dissent. In its praiseworthy zeal to protect the unwary victims of standardized adhesion contracts containing confession of judgment provisions, the majority unnecessarily and improperly strikes down a major portion of California's confession of judgment statute (namely, Code Civ. Proc., §§ 1132, subd. (a), 1133-1135). With all due deference, I suggest that in a situation calling for use of a surgeon's scalpel the majority reaches for a meat axe. The majority's holding of facial unconstitutionality conflicts with the latest expressions of the United States Supreme Court on the subject, and has the unfortunate (and wholly unnecessary) effect of invalidating even those confessions executed by willing and knowledgeable debtors for the purpose of avoiding unnecessary litigation over matters already in controversy. Because the confession procedure operates in an entirely proper fashion in such cases, and because the Legislature in 1975 has added adequate safeguards applicable to most adhesion-type contracts (see Code Civ. Proc., § 1132, subd. (b)), we should uphold the challenged legislation and require those debtors who may assert that their signatures were obtained improperly to raise the defense through appropriate post-judgment relief.

Initially, I stress that the case before us does not involve the typical, much-criticized, "cognovit note or agreement," of the sort contained in many adhesion-type contracts. As described by one observer, "This type of note, incorporated

*Assigned by the Chairperson of the Judicial Council.

in a contract or other document, attempts *in advance* of any legal controversy to authorize . . . the entering of judgment without notice and hearing for the amount confessed." (Note, *Cognovit Revisited: Due Process and Confession of Judgment* (1973) 24 Hastings L.J. 1045, 1046, italics in original, hereafter cited as *Note.*) It was this type of *advance* confession which we condemned in the case relied upon by the majority, *Hulland* v. *State Bar* (1972) 8 Cal.3d 440, 449 [105 Cal.Rptr. 152, 503 P.2d 608]. In *Hulland* an attorney (who, of course, owed a continuing *fiduciary* obligation to his client) had exacted such a confession from a new client as security for payment of future legal services. (*Id.*, at p. 443.)

In marked contrast, we are not presented with a case bearing any factual similarity to *Hulland.* In the matter before us, defendant county obtained the written confessions of judgment following its discovery of what it claims was welfare fraud perpetrated on it by plaintiffs. In the case of plaintiff Isbell the claim was followed by a *criminal* prosecution under section 11482 of the Welfare and Institutions Code; Isbell *pled guilty* to the charged offense and was *jailed.* Plaintiffs Pearson were alleged to have received an overpayment of welfare benefits before they executed their confession of judgment. While plaintiffs did not have the advice of counsel when the confessions of judgment were signed, in the language of a unanimous Court of Appeal herein, ". . . there is not a scintilla of evidence that they did not knowingly, intelligently and voluntarily waive their due process rights." It is significant that the confessions were not buried in the fine print of an adhesion contract. Furthermore, they were directed toward resolving an actual, existing controversy between the parties. The two confessions involved herein bear the caption "County of Sonoma, plaintiff vs. [Eva Isbell] [Omega and Clevie Pearson] defend-

ant," recite that each defendant confesses judgment in a specific sum, and contains a paragraph, *handwritten by the respective debtors,* which admits the facts of the fraud and sets forth a repayment plan. (For example, Isbell's confession stated, in her own handwriting, that "I gave false statements to in [*sic*] which to receive welfare. I plan to pay it back at $20.00 Twenty dollars a month until said debt is paid, after I am released from jail.")

Given the fact that the plaintiffs executed the confessions shortly after the controversy with the county had arisen (rather than as part of an adhesion contract for goods or services executed in advance of default), we may reasonably presume that plaintiffs fully understood their potential liability to the county, and knowingly and voluntarily confessed judgment in order to avoid the expense and inconvenience of contested litigation. So long as a debtor has notice of the existence of the dispute with his creditor and an opportunity to contest the claim if he chooses to do so, the confession of judgment procedure "raises no significant due process problems. This method of confessing judgment without action avoids needless litigation." (*Note, supra,* at p. 1046.)

As previously observed, in 1975 the Legislature acted to protect most adhesion contract debtors from the confession of judgment procedure. Under new section 1132, subdivision (b), a confession of judgment may not be entered against the debtor in an ordinary sale, service or loan transaction unless the debtor's own independent attorney certifies that he has fully informed his client of the facts and consequences, and has advised him to use the confession of judgment procedure.

By reason of the enactment of section 1132, subdivision (b), the interests of the typical adhesion contract debtor

have been adequately protected; indeed, the majority does not purport to invalidate that subdivision along with the rest of the statute. The majority's principal reason for striking down the *remaining* provisions appears to be that " 'a consent obtained in such a contract of adhesion is ineffective to waive the constitutional protections . . . .' " (*Ante*, p. 69, quoting from *Blair* v. *Pitchess* (1971) 5 Cal.3d 258, 276 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206].) As I have previously explained, however, we are not dealing with the typical *advance* confession clause in an adhesion contract.

The majority, ignoring a record which discloses no evidence whatever of overreaching, concludes that confessions of judgment "*most often*" are executed by debtors "who have little understanding" and "little choice" (*ante*, pp. 64, 65); the cognovit clauses appear "*most commonly*" in adhesion contracts; the nature of the device "*suggests*" a substantial disparity in bargaining power and "*implies*" overreaching; "*historical experience*" shows that "confessions" are "*most frequently employed* against those who are unaware" (*ante*, pp. 69-70, italics added). "Many courts" have observed that signators "*often* do not realize" they are waiving defense rights; thus the debtor's signature creates no inference of a knowing intelligently exercised waiver. (*Ibid.*) "In sum, sad *experience has shown* that the confession of judgment procedure lends itself to overreaching, deception, and abuse," so on its face the confession cannot be voluntary and knowing. (*Ante*, p. 71, italics added.) In short, ignoring the factual record before us, the majority predicates a result based on what it perceives has been the *general* experience with confession judgments, an area which has had, and continues to have, very active legislative interest and attention.

I am convinced that we should, much more wisely, approach this task on a case-by-case basis, invalidating the offending practice only in those situations in which due process standards are actually violated. The majority asserts that the statutes themselves "do not provide for a case by case determination" of the waiver question. (*Ante*, p. 71.) Yet, as the majority recognizes, judicial review is readily available, for the debtor may either move to set aside the judgment (Code Civ. Proc., § 473), or may file an independent action alleging fraud in procuring the judgment (see, e.g., *Olivera* v. *Grace* (1942) 19 Cal.2d 570, 575 [122 P.2d 564, 140 A.L.R. 1328]). As I explain below, the availability of such postjudgment relief clearly satisfies any due process objections. (*D. H. Overmyer Co.* v. *Frick Co.* (1972) 405 U.S. 174, 188 [31 L.Ed.2d 124, 135-136, 92 S.Ct. 775].) Although such a "case-by-case" approach may lack the simplicity of invalidating the confession of judgment procedure in its entirety, I suggest that such an approach is dictated by the fact that the confession procedure operates in an entirely proper manner in the vast majority of cases.

The majority holds that the confession of judgment procedure is unconstitutional on its face under due process principles because judgment may be entered without "a prejudgment judicial determination of the validity of the debtor's waiver . . . ." (*Ante*, p. 71.) Apart from the fact that in the present case we properly may presume such a valid waiver from the face of the handwritten confessions, in 1972 the United States Supreme Court *unanimously* rejected a similar claim of facial unconstitutionality. Thus, in *D. H. Overmyer Co.* v. *Frick Co.*, *supra*, 405 U.S. 174, the high court reviewed the validity of an Ohio judgment entered *by the creditor without notice to the debtor*, on the basis of the latter's prior execution of a promissory note containing a confession-of-judgment clause. In affirming

the judgment, the court expressly noted that "The due process rights to notice and hearing prior to a civil judgment are subject to waiver" (p. 185 [31 L.Ed.2d at p. 133]); that although such a waiver must be knowingly and voluntarily made, the debtor had not contended that it was unaware of the significance of the note's provisions (p. 186 [31 L.Ed.2d at p. 134]); and that the facts disclosed no unequal bargaining power or overreaching by the creditor (*ibid.*). The court concluded in these words, which are fully dispositive of the majority's major constitutional premise: "Our holding necessarily means that a cognovit clause is not, *per se,* violative of Fourteenth Amendment due process. [Debtor]could prevail here only if the clause were constitutionally invalid. The facts of this case, as we observed above, are important, and those facts amply demonstrate that a cognovit provision may well serve a proper and useful purpose in the commercial world and at the same time not be vulnerable to constitutional attack. [¶] Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision, other legal consequences may ensue." (Pp. 187-188 [31 L.Ed.2d at p. 135].)

The majority has found that four sections of the Code of Civil Procedure violate due process principles. However, the United States Supreme Court, as I have noted, has said that due process rights may be waived in the cognovit situation. While the waiver must be made knowingly in this case, that fact appears from the face of the handwritten confessions. Having been formally charged with a welfare fraud, and having pled guilty and while serving a jail term therefor, Isbell should, reasonably, be held to have possessed both knowledge of the charge and full opportunity to defend. Similarly, nothing in the record suggests that the Pearsons were ignorant of the nature of the claims against them, the amount involved, and of their opportunity to resist the claim; their own confession, on its face, demonstrates this knowledge.

The high court concluded in *Overmyer* that the debtor was not left without remedy by entry of the confessed judgment, as he may move to vacate the judgment upon a proper showing of a valid defense. (405 U.S. at p. 188 [31 L.Ed.2d at pp. 135-136].) We should follow *Overmyer* and uphold the constitutionality of California's confession of judgment procedure. Although that procedure may, in rare cases, operate unfairly, the Legislature has reformed the procedure as it applies to adhesion contracts, and in all other cases the debtor is afforded the opportunity to nullify the confessed judgment through an appropriate motion to vacate it. There is, moreover, a presumption of constitutionality of a statute. (*In re Ricky H.* (1970) 2 Cal.3d 513, 519 [86 Cal.Rptr. 76, 468 P.2d 204]; 5 Witkin, Summary of Cal. Law (8th ed. 1974) p. 3281.) No satisfying reason appears for invalidating the entire statutory scheme, thereby precluding legitimate use of the confession procedure in those situations where the parties desire to avoid unnecessary contested litigation.

I conclude, in accordance with the *Note* cited above, that "The cases considered clearly state that cognovit judgments are alive and well. They have withstood attacks under the due process clause of the Fourteenth Amendment. Even though a property interest sufficient to warrant notice and hearing is involved, the judicial policy reflected in *Sniadach* and *Fuentes* has not been extended to cognovit judgments. Due process rights can be waived and cognovit judgments can be entered if waiver is evident from the contract containing the cognovit note. [¶] *Overmyer* indi-

cates that the Fourteenth Amendment is almost certainly satisfied if there is an appellate procedure conforming to the requirements of due process. . . . [¶] It can be argued that the duty of the courts is to provide an impartial, neutral forum. Their function is not to demand litigation in every dispute. Since waiver of due process rights can be made, the court's function is to provide a forum for attacking the validity of waiver if, but only if, the debtor wants to challenge it." (*Note, supra,* at pp. 1064-1066.)

I would affirm the judgment.

Clark, J., and Manuel, J., concurred.

[21 Cal.3d 561a]

[S.F. No. 23604. June 15, 1978.]

EVA ISBELL et al., Plaintiffs and Appellants, v.
COUNTY OF SONOMA et al., Defendants and Respondents.

[Modification of opinion (21 Cal.3d 61, —Cal.Rptr.—, —P.2d—). on denial of petition for rehearing.]

THE COURT.—The opinion herein, appearing at 21 Cal. 3d 61, is modified as follows:

On page 64, line 6, change "1135" to "1134."

On page 65, line 7, change "1135" to "1134."

On page 66, 2d paragraph line 4, change "1135" to "1134."

On page 67, lines 12-16, delete the sentence "In courts other than justice courts the creditor should file the judgment with the court clerk, 'who must endorse upon it, and enter a judgment of such court for the amount confessed' ment with the court clerk, 'who must endorse upon it, and (Code Civ. Proc., § 1134); in justice courts the confession may be filed with either the judge or the clerk (Code Civ. Proc., § 1135)." and add in its place the sentence "The creditor files the judgment with the court clerk, 'who must endorse upon it, and enter a judgment of such court for the amount confessed' (Code Civ. Proc., § 1134)."

On page 68, line 5, change "1135" to "1134."

On page 75, line 18, delete "1134 and 1135" and add in its place "and 1134."

On page 75, following the word "void" at the end of the opinion, add footnote 9. Footnote 9 reads as follows:

"We hold here only that sections 1132, subdivision (a), 1133, and 1134 of the Code of Civil Procedure enact an un-

constitutional procedure. The validity of judgments entered pursuant to stipulation or agreement under the authority of other statutes or rules of court is not before us in the present case, and we do not imply that such judgments are void."

On page 76, line 6 of the dissenting opinion, change "1135" to "1134."

On page 79, line 38 of the dissenting opinion, change "four" to "three."

STIPULATION OF FACTS

Isbell

1. Plaintiff, Eva Isbell, presently resides at 940 Starr View Drive, Windsor, with her five children. She has been a resident of Sonoma County since 1960.

2. Defendant Sonoma County is a political subdivision of the State of California, and defendants Williams, Tonkin, Snyder, and Martinez are the agents and employees of Sonoma County who, acting in their official capacity, executed the transactions described herein.

3. The California laws governing confessions of judgment are found in Code of Civil Procedure sections 1132 through 1135 inclusive. Sections 1132 through 1135 were enacted in 1872 and remain in full force and effect.

4. On November 15, 1966 the District Attorney of Sonoma County filed a criminal complaint against plaintiff alleging violation of Welfare and Institutions Code § 11482. On December 12, 1966, plaintiff entered a plea of guilty to the charge and was sentenced to a 30-day concurrent term in County Jail. No fine or restitution was ordered.

5. On January 27, 1967, while plaintiff was in County Jail, defendant Williams, acting through Deputy Clerk Barbara E. Alspaugh, requested plaintiff to execute a confession of judgment in favor of defendant Sonoma County which is attached hereto as Exhibit "A". Said judgment was then filed in the Municipal Court of the County of Sonoma by defendant Tonkin, acting through Deputy Clerk Eleanor Shaff.

6. On January 27, 1967, defendant Tonkin issued an abstract of the judgment against plaintiff which was subsequently recorded in the Office of the County Recorder, Herb Snyder. Since that time, defendant Martinez, as head of the

Sonoma County Collections Department, has attempted collection of the judgment.

7. In July of 1974, plaintiff purchased a house with the assistance of the Farmers Home Administration. The judgment was then attached as a lien on plaintiff's house.

8. On January 27, 1967, plaintiff did not consult an attorney prior to signing the confession of judgment.

9. Plaintiff is a lay person with no training or background in matters of law and has only a lay person's understanding of the legal consequences of a confession of judgment.

10. There is an actual and present controversy between plaintiff and defendants. Plaintiff contends that the California laws authorizing and governing confession of judgment are unconstitutional, but defendants deny and dispute this.

It is further stipulated and agreed that the above stipulated facts are the undisputed material facts upon which this action may be decided, being treated as facts proved in open court.

Pearson

1. Plaintiffs Clevie Pearson and Omega Pearson presently reside at 390 Billington, Windsor. They have been residents of Sonoma County since 1960.

2. Defendant County of Sonoma is a political subdivision of the State of California and defendants Williams, Tonkin, Snyder and Martinez are the agents and employees of Sonoma County who, acting in their official capacity executed the transactions described herein.

3. The California laws governing confession of judgment are found in Code of Civil Procedure sections 1132

through 1135, inclusive. Sections 1132 through 1135 were enacted in 1872 and remain in full force and effect.

4. Prior to February, 1966, the Sonoma County Welfare Department alleged that an overpayment of benefits had been made to Clevie Pearson and Omega Pearson.

5. On February 8, 1966, at plaintiff's home, defendant Williams, acting through Deputy Clerk Barbara E. Alspaugh, requested plaintiff to execute a confession of judgment in favor of defendant County of Sonoma which is attached hereto as Exhibit "B". Said judgment was then filed in the Municipal Court of the County of Sonoma by defendant Tonkin, acting through Deputy Clerk Edith Bosworth.

6. On February 16, 1966, defendant Tonkin issued an abstract of the judgment against plaintiff which was subsequently recorded in the Office of the County Recorder, Herb Snyder. Since that time, defendant Martinez, as head of the Sonoma County Collections Department, has attempted collection of the judgment.

7. On February 8, 1966, plaintiffs did not consult an attorney prior to signing the confession of judgment.

8. Plaintiffs are lay persons with no training or background in matters of law and have only a lay person's understanding of the legal consequences of a confession of judgment.

9. There is an actual and present controversy between plaintiffs and defendants. Plaintiffs contend that the California laws authorizing and governing confession of judgment are unconstitutional, but defendants deny and dispute this.

It is further stipulated and agreed that the above stipulated facts are the undisputed material facts upon which this action may be decided, being treated as facts proved in open court.

IN THE MU[illegible]IPAL COURT FOR THE SANTA ROSA [illegible]ICIAL DISTRICT, COUNTY OF SONOMA, STATE OF CALIFORNIA

COUNTY OF SONOMA

Plaintiff

vs.

Eva Isbell -1930-2466

Defendant

CONFESSION OF JUDGMENT
(CCP 1132-1135)

18465

FILED

JAN 27 1967

MABEL TONKIN, Clerk of the Municipal Court of the [illegible]atral Judicial District Sonoma County, State of California

By _____ Deputy Clerk

Bail in $695.98 plus medical

I, Eva Isbell, being duly sworn, declare and depose as follows:

I hereby confess judgment in favor of the County of Sonoma, the plaintiff above named, for the sum of $596.98 Plus medical $64 ~~and~~ authorize the entry of judgment thereof against me. This judgment applies to any personal and real property I now own or may acquire.

This Confession of Judgment is for a debt justly due from me to the said County of Sonoma, and arises upon the following facts: to wit,

I gave false Statements to ~~in~~ which to receive Welfare. I plan to pay it back at $20.00 Twenty dollars a month until said debt is paid, after I am released from Jail.

Eva Isbell
(Signature of Defendant)

Subscribed and sworn to before me this

twenty-fifth day of January 1962.

GENE D. WILLIAMS
Barbara E. Mayaugh, D.C.C.

County Clerk
Deputy Clerk

In accordance with provisions of Section 1135, Code of Civil Procedure, Judgment is hereby rendered against Eva Isbell, in favor of the County of Sonoma in pursuance to the within Confession of Judgment for $596.98 plus Medical Bills determined and costs in sum of $9.00.

Dated JAN 27 1967

MABEL TONKIN, CLERK

By ELEANOR SHAFF Deputy Clerk

ENTERED MIN. Bk. 12 Pg. 270

SSD 423 - 8/62

EXHIBIT "A"

IN THE MUNICIPAL COURT FOR THE SANTA ROSA JUDICIAL DISTRICT, COUNTY OF SONOMA, STATE OF CALIFORNIA

COUNTY OF SONOMA

Plaintiff

vs.

Omega & Clovie Pearson

Defendant

FILED

FEB 16 1966

MABEL TONKIN, Clerk of The Municipal Court of the Central Judicial District Sonoma County, State of California

By ..... Deputy Clerk

CONFESSION OF JUDGMENT (CCP 1132-1135)

No. 1640

I, Omega Pearson, being duly sworn, declare and depose as follows:

I hereby confess judgment in favor of the County of Sonoma, the plaintiff above named, for the sum of $ 193.00, and authorize the entry of judgment thereof against me. This judgment applies to any personal and real property I now own or may acquire.

This Confession of Judgment is for a debt justly due from me to the said County of Sonoma, and arises upon the following facts: to wit,

That the trust account set up for Ethridge further education was missed used, which made it income for the A, M, E, grant. I will repay it if I receive any extra money, or as I can

Omega Pearson

(Signature of Defendant)

Subscribed and sworn to before me this

16th day of February 1966.

EUGENE D. WILKINS
By Barbara Wyngaert, D.C.C. County Clerk

In accordance with provisions of Section 1135, Code of Civil Procedure, Judgment is hereby rendered against Omega Pearson in favor of the County of Sonoma in pursuance to the within Confession of Judgment for $193.00 and costs in sum of $9.00.

Dated FEB 16 1966

MABEL TONKIN, CLERK

By EDITH BOSWORTH, Assistant Deputy Clerk

ENTERED MIN. Bk. 10 Pg. 404

Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-440

COUNTY OF SONOMA, EUGENE D. WILLIAMS, individually and in his official capacity as County Clerk, MABEL TONKIN, individually and in her official capacity as Clerk of Municipal Court, HERB SNYDER, individually and in his official capacity as County Recorder, VICTOR MARTINEZ, individually and in his official capacity as Head of the Collections Department
Petitioners

vs.

EVA ISBELL, CLEVIE PEARSON and OMEGA PEARSON,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENTS' BRIEF IN OPPOSITION

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San Francisco, California 94104
Counsel for Respondents.

Dated: October 12, 1978

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-440

COUNTY OF SONOMA, EUGENE D. WILLIAMS, individually and in his official capacity as County Clerk, MABEL TONKIN, individually and in her official capacity as Clerk of Municipal Court, HERB SNYDER, individually and in his official capacity as County Recorder, VICTOR MARTINEZ, individually and in his official capacity as Head of the Collections Department
Petitioners

vs.

EVA ISBELL, CLEVIE PEARSON and OMEGA PEARSON,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

RESPONDENTS' BRIEF IN OPPOSITION

The respondents Eva Isbell, Clevie Pearson and Omega Pearson respectfully request that this Court deny the petition for Writ of Certiorari, seeking review of the California Supreme Court's opinion in this case. That opinion is reported at 21 Cal.3d 61 *rehrg. denied as modified,* 21 Cal.3d 561a (1978).

STATEMENT OF THE CASE

In this action, respondents Eva Isbell and Clevie and Omega Pearson sought a declaration that the California

Confession of Judgment procedure found at California Code of Civil Procedure Sections 1132(a), 1133 and 1134 is violative of the Due Process Clause of Fourteenth Amendment of the United States Constitution and the Due Process Clause of the California Constitution. More specifically respondents sought a declaration that the judgments entered against them were void.

Respondent Isbell was an inmate in the Sonoma County jail when she was confronted by a county official who presented her with a confession of judgment form to sign for the alleged amount of welfare overpayment. Petition A-27. In this document she confesses judgment for the sum of $596.98 "plus medical to be determined." Petition A-30.

On January 27, 1967, this confession of judgment was entered against Isbell in Sonoma County Municipal Court case No. 18465. It must be assumed that no notice of this entry of judgment was received by respondent Isbell because there is no address for Isbell on the document. Petition A-30.

Respondents Pearson were confronted by a county official in their home with the facts of an alleged welfare overpayment and were then requested to sign a confession of judgment form in the amount of the alleged overpayment. Petition A-29. The document they signed confesses judgment for the sum of $193.00. Petition A-31. On February 16, 1966, this confession of judgment was entered against the Pearsons in Sonoma County Municipal Court Case No. 16406. It must be assumed that no notice of this entry of judgment was received by the Pearsons because there is nothing on the document which shows their address. Petition A-31.

As a practical matter, the above judgments, are no longer of any force or effect. These judgments against respondents are now more than ten years old and execution upon them has never been stayed during the pendency of this action in the trial court, the California Court of Appeal and the California Supreme Court.

The California Supreme Court, upon analysis of the California confession of judgment procedure presented by the facts of this case, held that since the California statutes did not provide any procedure for determining whether an alleged debtor's waiver of his or her due process rights was voluntary, knowing, and intelligent, the statutes violated the debtor's right to due process of law under the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

INTRODUCTION

Petitioners seek review of the California Supreme Court's decision declaring the judgments entered against respondents void for having violated respondents' rights to due process of law. However, as set forth above, these judgments are now more than ten years old and unenforceable against respondents under California law. Since these judgments are no longer enforceable against the respondents, the parties lack a legally cognizable interest in the outcome of further review of this case, and therefore no "case or controversy" is presented.

Should this Court consider the merits of the County's Petition, however, it is clear that no grounds justify the exercise of this Court's certiorari jurisdiction in this case. The California Supreme Court has declared the California

confession of judgment procedure unconstitutional on the ground that the statutory procedure violates the due process clause of the Fourteenth Amendment. As we will show below, that decision was correct and should not be disturbed by this Court.

Under the California statutory frame-work, a confession of judgment may be entered without action in any court of competent jurisdiction for money due or to become due, or to provide security against contingent liability on behalf of a defendant or for both purposes. Code Civ. Proc. 1132(a). The confession must be in writing and signed by the defendant. Code Civ. Proc. 1133. Additionally it must contain a verified statement by the defendant authorizing the entry of judgment for a specified sum; if it is for money due or to become due, it must concisely state the facts from which the debt arose and that the sum confessed is justly due or will become due. *Id.* And if its purpose is to secure the plaintiff against contingent liability, the document must concisely state the factual basis of the liability and that this sum does not exceed the actual amount of the liability. *Id.*

This statement is then filed with the clerk of the court who must endorse it and enter a judgment for the amount confessed plus certain statutory costs. Code Civ. Proc. § 1134. This statement and affidavit with the judgment endorsed upon it then becomes the judgment roll. *Id.*

Whatever "protection" this statutory scheme affords persons who are asked to sign confessions of judgment must be contrasted with the protections that are *not* afforded by either statutory procedure or court rule. These include:

(1) The statute does not require that the confession of judgment document contain any notice to the signor that he is waiving his constitutional rights to contest the debt, to raise defenses like the statute of limitations, and to notice that a judgment has been entered against him.

(2) The statute does not require that the alleged debtor's address be included on the form.

(3) The statute does not provide that there be any consideration for the execution of the Confession of Judgment.

(4) The statute does not provide that an alleged debtor should consult an attorney before signing,[1] or require an attorney's approval.

(5) The California statutes do not provide that the defendant be notified of the Entry of Judgment against him.

(6) The California statutes do not provide that defendants be informed of any rights to attack or vacate the judgment, nor do they provide any procedure for determining whether the waiver of constitutional rights was knowing, intelligent, and voluntary.[2]

(7) The California statutes do not provide any procedure for attacking an incorrect judgment unless it can be proven that the judgment was based on extrinsic fraud.

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[1]Compare Code Civ. Proc. § 1133 with Code Civ. Proc. § 412.20 which requires such notice on summonses in ordinary actions.

[2]Even if the defendant somehow learns of the judgment, Code Civ.Proc. § 473 only allows him to vacate it if he moves within six months of entry of judgment and can prove that the judgment was entered due to mistake, inadvertence, surprise or excusable neglect. Beyond six months, the judgment can only be vacated if it can be proven it was entered as a result of extrinsic fraud.

Respondents submit that should this Court reach the merits of petitioners' claim that certiorari should be granted, the decision of the California Supreme Court invalidating California's Confession of Judgment procedure is entirely consistent with this Court's decision in *Overmyer v. Frick,* 405 U.S. 174 (1972). Moreover, it is also consistent with the decisions of the lower courts which have ruled on this issue. Finally, respondents will also demonstrate that the California Supreme Court's decision does not preclude a legislative solution that will strike a proper balance between commercial interests and the due process rights of individuals.

1. Because of the Lack of a Present "Case or Controversy" Within the Meaning of Article III, Section Two of the United States Constitution, This Court Should Not Grant a Writ of Certiorari in the Present Case.

It is axiomatic that in order for this Court to have jurisdiction on an appeal, there must be issues that present a "case or controversy" within the meaning of Article III, Section two of the Constitution of the United States. This Court has stated repeatedly that the duty of the federal court "is to decide actual controversies by a judgment which can be carried into effect and not to give opinions upon moot questions or abstract propositions or to declare principles or rules of law which cannot affect the matter in issue in the particular case before it." *Mills v. Green,* 159 U.S. 651, 653. (1895); *United States v. Alaska S.S. Co.,* 253 U.S. 113, 116 (1929); *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-241 (1937). "[S]imply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell*

v. McCormack, 395 U.S. 486, 496, (1969).[3] Thus it is clear that federal courts do not have power to decide cases where "there is no longer an adversary relationship between parties having a legally cognizable interest in the outcome of the [particular] case." *Powell v. McCormack, supra.* Respondents in the present case respectfully suggest that there is no longer a concrete controversy touching the legal relationship between the County of Sonoma and respondents herein.

The confessions of judgment entered against respondents Isbell and Pearson are over ten years old. The judgment against respondent Isbell was entered against her on January 27, 1967 in the Sonoma County Municipal Court, and the judgment against the Pearsons was entered against them on February 16, 1966. Because these judgments were entered over ten years ago, no separate action upon either of these judgments can be brought against the respondents. California Code of Civil Procedure, § 335 and § 337.5, subdivision 3.[4]

Moreover the County of Sonoma cannot presently have a writ of execution or writ for the enforcement of the present judgment issued as a matter of right. Again, the reason

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[3]The requirement of a "case or controversy" applies to an action for declaratory relief. *Super Tire Engineering Company v. McCorkle,* 416 U.S. 115, (1974). This requirement also applies to this Court's power to hear cases from state courts. *See Richardson v. Ramirez,* 418 U.S. 24, 36 (1974).

[4]§ 335 of the California Code of Civil Procedures provides:
"The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"
§ 337.5 of the California Code of Civil Procedures provides a pertinent part:
"Within 10 years:
. . .
3. An action upon a judgment or decree of any court of the United States or of any state within the United States."

for this limitation on such normal judgment creditor remedies is that a ten year period since the entry of the confession of judgment has expired. *See* California Code of Civil Procedure, § 681.[5] Thus the County of Sonoma is no longer entitled to the enforcement of its judgment in the present case either by writ of execution or by an independent action based upon such judgment.[6] The respondents correspondingly are no longer obligated to pay anything to satisfy these judgments.

Thus there is no longer an adversary relationship between parties having a cognizable interest in the outcome of the case. Any decision by this Court can have no effect upon the matter at issue in this particular case. This Court cannot rejuvenate or make effective the expired judgments herein.

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[5] § 681 of the California Code of Civil Procedure provides:
"The party in whose favor judgment is given may, at any time within 10 years after the entry thereof, have a writ or order issued for the execution or enforcement of the judgment. If, after the entry of the judgment, the issuing of such writ or order is stayed or enjoined by any judgment or order or court, or by representation of law, the time during which it is so stayed or enjoined must be excluded from the computation of the 10 years within which execution or order may issue."

[6] Respondents are familiar with California Code of Civil Procedure Section 685 which sets out steps which must be taken before a writ of execution may be obtained after the expiration of ten years from the date of entry of judgment. The case law interpreting this section makes it clear that in order to take advantage of this section a judgment creditor must show the court that during the period of time following the entry of judgment, he has exercised due diligence in locating and levying upon property owned by the debtor. *See, e.g., Lohman v. Lohman,* 29 Cal.2d 144, 148-149 (1946); *Di Corpo v. Di Corpo,* 33 Cal.2d 195 (1948); *Butcher v. Brouwer,* 21 Cal.2d 354 (1942). Moreover, a court, even after a showing of due diligence, may deny its process where a debtor shows circumstances which evidence that a creditor is not now entitled to collect on his judgment. *Lohman v. Lohman, supra,* 29 Cal.2d at 149. The County of Sonoma has never taken any steps to invoke the provisions of Code Civ. Proc. § 685 in this case.

Therefore, because any decision by this Court can have no effect on the matter in issue, the case is moot. *See Mills v. Green, supra,* at 653; *North Carolina v. Rice,* 404 U.S. 244, 246 (1971); *United States v. Alaska S.S. Company, supra,* at 116.

2. The County of Sonoma Has Not Used a Confession of Judgment Since 1974 and for That Reason This Case Does Not Present a "Case of Controversy" Necessary to Invoke the Judicial Power Conferred on This Court by Article III of the United States Constitution.

Attorneys for the respondents have gone through the court files of the Superior and the Municipal Courts of the County of Sonoma and have found no confession of judgment filed therein after 1974. *See* Affidavit of David C. Lewis attached in the Appendix.[7] Additionally, particular note should be taken of the fact that nowhere in the petition for certiorari do petitioners say that they use this device presently or intend to use it in the future. Basically they have abandoned this procedure as a means of resolving disputes which arise in welfare fraud or overpayment cases. Since the County of Sonoma no longer uses confessions of judgment in these particular cases, there is correspondingly a lack of necessary viable controversy between the County of Sonoma and the respondents herein. Because there is no longer a viable controversy between the two parties, there

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[7] It is suggested by respondents that the rule against reference to facts outside the record does not apply in situations where mootness is possible since the facts concerning such problems almost always occur outside the record of the case below. Since the absence of a controversy is jurisdictional, the point is not one that counsel may disregard. *See United States v. Alaska S.S. Company, supra,* at 116. *See also Stern and Gressman, Supreme Court Practice* pp. 896-897 (5th Ed. 1978).

is no "case or controversy" as understood by the Article III which would allow this Court to hear this matter. *Powell v. McCormack, supra.*

3. The Decision of the California Supreme Court in Isbell v. County of Sonoma is Not in Conflict With the Decision of This Court in Overmyer v. Frick.

The decision of the California Supreme Court in this case is entirely consistent with this Court's decision in *Overmyer v. Frick, supra.* Both *Isbell* and *Overmyer* begin the constitutional analysis by finding the case before them to involve the deprivation of property within the purview of the due process clause of the Fourteenth Amendment. Any such deprivation requires some form of notice and an opportunity to be heard. In *Overmyer* this Court, stating that these due process rights are subject to waiver, announced that a valid waiver must be voluntarily, knowingly and intelligently made. 405 U.S. at 185.

In *Overmyer,* this Court analyzed the transactions between the parties and found the corporate parties to have bargained at arm's length and entered into a negotiated contract where adequate consideration was given for the cognovit clause in the note. Given all the circumstances preceding execution of the promissory note containing the cognovit clause, this Court held that the Overmyer Company voluntarily, intelligently and knowingly waived its rights to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences. 405 U.S. at 187.

Having found a valid waiver in the case before it, this Court did not undertake to analyze explicitly the constitutionality of the Ohio confession of judgment procedure.

However, this Court in its concluding comments (405 U.S. at 188), points out that the Ohio procedure which it has implicitly upheld provides for notice of entry of the judgment and a postjudgment hearing at which the defendant can vacate the judgment if a valid defense exists.[8]

The California procedure at issue here is far harsher than the Ohio procedure before this Court in *Overmyer.* This Court recognized in *Overmyer* that more onerous procedures might not be constitutional:

> Our holding, of course, is not controlling precedent for other facts of other cases. For example, where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor received nothing for the cognovit provision, other legal consequences may ensue. 405 U.S. 188.

In following the admonition of this Court in *Overmyer,* the California Supreme Court analyzed the confession of judgment procedures which affected the respondents in this case. In *Isbell,* the court prefaced its summary of the facts by stating "Although confessions of judgment are usually employed to enforce claims of private creditors, the instant action presents perhaps *a more doubtful usage.*" 21 Cal.3d 65 (Emphasis added). The court implicitly finds from the stipulated facts that there is great disparity in bargaining power between the County and the welfare recipients who signed confessions of judgment without receiving any consideration for doing so. Then the California court undertakes an exhaustive examination of the legal consequences

[8]Justice Douglas, in his concurring opinion at 405 U.S. 189, emphasizes that the Ohio procedure for reopening a confession of judgment presents only a "minimal obstacle."

to these confession of judgment welfare debtors under the California confession of judgment procedure.

The California court finds that the California statutory procedure: 1) results in entry of final judgment upon presentation of a signed confession of judgment to the court clerk; 2) contains no provision in the procedure for notice of entry of judgment to the debtor, and 3) does not provide any opportunity for hearing to present evidence that the judgment should not be entered. 21 Cal.3d at 66-67. The Court then concludes, citing *Overmyer,* that such a procedure, in allowing a judgment to be entered without prior notice and hearing, is constitutional "only if the confession constitutes a *valid waiver* of the debtor's due process rights." 21 Cal.3d at 69 (Emphasis the court's).

In determining whether a waiver has been shown, the Court first notes that "waiver of constitutional rights is not presumed." 21 Cal.3d at 68.[9]

Since there are no cases dealing with confessions of judgment based on welfare related debts, the California court analogizes to the cases and commentaries concerning confessions of judgment in consumer credit transactions in an attempt to establish whether the signed confession document itself demonstrates that the debtor has in fact made a voluntary, knowing and intelligent waiver. The court concludes that the cases and commentaries uniformly demonstrate that the signed confession document

[9]The California court notes that welfare debtors are not included in the several categories of debtors the California Legislature has excluded from the use of confessions of judgment, nor are they benefited by recently enacted protections covering consumer transactions (Code Civ. Proc. § 1132(b)). 21 Cal.3d at 67.

"*cannot,* on its face, represent a voluntary, knowing and intelligent waiver." 21 Cal.3d at 71. (Emphasis added)

The court then addressed the petitioners' contention that the sufficiency of the debtor's waiver must be determined on a case by case basis. It found, however, that under the California statutes, there is no provision for a case by case determination as there is in the Ohio procedure. The signed confession must be entered as a final judgment upon presentation to the clerk. Code Civ. Proc. § 1134. The clerk has no authority to reject confessions on the ground that the document does not adequately prove a valid waiver. Moreover, there is no procedure available to a defendant to challenge the validity of the waiver. Upon a thorough analysis, as instructed by *Overmyer,* of the facts of this case as they lead step by step through the California confession of judgment procedure to entry of final judgment, the California Supreme Court is unable to find the existence of the constitutional due process protections of notice and a hearing or a voluntary, knowing and intelligent waiver of notice and hearing. The California court holds that a judgment entered pursuant to the California procedures is therefore constitutionally defective. 21 Cal.3d at 71.

The California Supreme Court nowhere says that a confession of judgment is *per se* violative of Fourteenth Amendment due process. Rather, the California Supreme Court simply holds that because the confession document itself cannot demonstrate a valid waiver of due process rights, and because the California procedure, unlike Ohio's, provides for entry of judgment on a confession without any opportunity to challenge the validity of a waiver, that procedure is violative of due process. Thus the California

Supreme Court's decision is consistent with this Court's decision in *Overmyer*.

4. Lower Courts Are Consistent in Following Overmyer v. Frick.

Petitioners assert that lower courts applying the *Overmyer* decision have created a conflict as to whether due process requires that a hearing on the validity of a waiver must precede the entry of judgment. Analysis of the cases cited shows no such operative conflict in cases which have considered confession of judgment procedures.

This Court's decision in *Overmyer v. Frick, supra,* held that confessions of judgment are not unconstitutional *per se* and that a valid waiver of constitutional due process rights may be found upon analysis of a given case. This Court analyzed the transactions between the Overmyer Company and Frick and found a valid waiver. This Court did not go on to analyze the Ohio confession of judgment procedure to determine whether it established a constitutionally adequate procedure for assuring that a valid waiver of due process rights had occurred. The Court only implicitly upheld the Ohio statutory procedure; it did not decide the question of the timing of a hearing consonant with due process requirements.

In the cases cited by petitioners, courts have considered the confession of judgment procedures of eight states. These cases are:

OHIO

Overmyer v. Frick, 405 U.S. 174 (1972)

PENNSYLVANIA

Swarb v. Lennox, 405 U.S. 191 (1972)

NEVADA

Tunheim v. Bowman, 366 F.Supp. 1392 (D.Nev. 1973)

MARYLAND

Billingsley v. Lincoln National Bank, 320 A.2d 34 (1974)

ILLINOIS

Irmco Hotels v. Solomon, 326 N.E.2d 542 (1975)
Starr Finance v. McGee, 326 N.E.2d 518 (1975)
Scott v. Danaher, 343 F.Supp. 1272 (N.D. Ill. 1972)

LOUISIANA

Buckner v. Carmack, 372 So.2d 326 (1973)

DELAWARE

Osmond v. Spence, 327 F.Supp. 1349 (D.C. Del. 1971) and 359 F.Supp. 124 (D.C. Del. 1972)

CALIFORNIA

Isbell v. County of Sonoma, 21 Cal.3d 61 (1978)

The Ohio, Pennsylvania, Maryland, Illinois and Louisiana confession of judgment procedures provide for notice of entry of judgment and an opportunity for a postjudgment hearing on valid defenses. These procedures were upheld by the courts which considered them as being consistent with *Overmyer*.

The courts in *Tunheim, Billingsley, Irmco* and *Starr* were presented with *per se* challenges to the constitutional validity of the confession of judgment procedures involved. Those courts followed *Overmyer* in that they rejected the *per se* challenge to validity of the statutes.

The *Buckner* and *Scott* cases involved challenges to the execution and garnishment procedures of Louisiana and Illinois, respectively, where the underlying judgments were

based on a confession of judgment. The thrust of both cases was the overall constitutionality of execution and garnishment procedures, and although both courts discussed, in dictum, confession of judgment procedures with respect to notice and hearing, the validity of the underlying confession of judgment procedures was not expressly before the courts.

The only lower courts to deal with challenges not alleging *per se* unconstitutionality of confession of judgment procedures were the U.S. District Court for Delaware in *Osmond v. Spence, supra,* and the California Supreme Court in *Isbell v. County of Sonoma, supra.* In both these cases, the courts were presented with procedures which provided no notice of entry of judgment and no opportunity for a post-judgment hearing on a valid defense. While both courts indicated that notice and hearing should precede entry of final judgment (359 F. Supp. at 127; 21 Cal.3d at 71), the actual holding in both cases is limited to finding the statutes unconstitutional based on the total absence of notice of entry of judgment and opportunity for a hearing at *any* time. Thus, since the relief fashioned by the Delaware and California courts did not hold all prior judgments by confession void *per se* but only required procedures allowing judgment debtors with a valid defense to apply for a hearing, there is no conflict between these decisions and the other lower court decisions, nor with *Overmyer.*

The lone case where a hearing has been required prior to entry of judgment by confession is *Virgin Islands National Bank v. Tropical Ventures, Inc.,* 358 F. Supp 1203 (D.V.I. 1973). The circumstances there were so unique, however, that it hardly warrants certiorari jurisdiction. In

the Virgin Islands case, an action had been filed in federal court, and there had been no appearance by defendant. Plaintiff's attorney wished to enter judgment on a confession of judgment, but there was no procedure to follow. The district court in the absence of a procedure, required plaintiff's attorney to notify defendants of an opportunity to challenge the waiver of constitutional rights before he would allow judgment to be entered. Thus, any conflict it may have created with *Overmyer* is limited to the use of confessions of judgment in federal court, and it is of limited precedent in states with established confession of judgment procedures.

Petitioners also argue that because reported cases which have considered the conduct of hearings on the validity of the waiver of constitutional rights in a confession of judgment differ in the assignment of the burden of proving valid waiver, certiorari is appropriate. However, the assignment of the burden of proceeding at the hearing is generally a matter of state law which scarcely rises to the level of a substantial federal question required by Rule 19(1)(a).[10]

Petitioners have not shown the existence of state court decisions not in accord with the decisions of this Court.

5. Concern For Commercial Consequences Should Be Addressed to the Legislature.

Petitioners and Amici Curiae, the Carpenter Trust Funds For Northern California, allege that the California Supreme Court's decision in this case will have serious consequences for this country's commercial and court systems,

[10] *Cf. Lindsey v. Normet,* 405 U.S. 56, 65-69. (1972)

and therefore this Court should exercise its discretion to review that decision. They raise the specter of "knowledgeable parties" being coerced to parade to the already mobbed courthouse doors in order to resolve disputes in the commercial arena. Then they suggest that these well informed parties will be compelled to the further use of attorneys in every case involving commercial disputes. In addition, they state that these consequences infringe upon the rights of well informed parties to take their commercial destiny into their own hands. In essence, this Court is asked to believe that the foundations of commerce and the court system will be dealt an incapacitating blow unless this Court springs to the rescue.

Nothing could be further from the truth. There are procedures other than confessions of judgments available to well informed parties in the world of commerce. Clearly, nothing in the decision by the Supreme Court of California precludes the use of stipulated judgments, or the taking of default judgments. *See Isbell v. County of Sonoma, supra,* 21 Cal.3d at 75 n.9.

Indeed, petitioners appeal is to the wrong forum.[11] The California Supreme Court's opinion in no way precludes the legislature from remedying the constitutional deficiency in the challenged statutes. Unquestionably it is possible to draft a statute that would include a mechanism for a judicial officer to determine the facial validity of a purported waiver of due process rights.

The prognosis by Amici Curiae that no such statute can be drafted is overly pessimistic. First, in reaching that

[11]This Court has stated, "problems of this kind are peculiarly appropriate grist for the legislative mill." *Swarb v. Lennox,* 405 U.S. 191, 202 (1972).

position Amici misinterpret the California Supreme Court's opinion. The California Supreme Court did not hold that there could not be a valid waiver of due process rights; it did analyze the California statutory procedure in regard to confessions of judgment, finding that there was no statutory mechanism for determining the validity of a purported waiver since an alleged debtor's signature on a document could not, *ipso facto,* demonstrate a valid waiver. Moreover, that a suitable procedure can be adopted is graphically demonstrated by the experience in Delaware. After the Delaware confession of judgment procedure was invalidated in *Osmond v. Spence, supra,* the Delaware legislature enacted a new provision that would appear to meet the constitutional objections that led the court to invalidate California's procedure.[12]

Certainly the California Legislature can draft a comparable provision that protects both amici's commercial interests and the due process rights of individuals like respondents.

[12]Delaware Code Annotated tit.10, Sec. 2306(b) reads:
"A judgment by confession shall not be entered as a final judgment, effective in all respects as a judgment after trial, until the Prothonotary gives written notice to the defendant-obligor by certified mail, return receipt requested, of an opportunity for a judicial determination as to whether the defendant-obligor understandingly waived his right to notice and an opportunity to be heard prior to the entry of final judgment against him."

CONCLUSION

For the above stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,
DAVID C. LEWIS
RICHARD M. PEARL
WILLIAM C. MCNEILL, III
Counsel for Respondents.

Dated: October 12, 1978

(Appendix Follows)

APPENDIX

Appendix

AFFIDAVIT

State of California
County of San Francisco } ss

I, DAVID C. LEWIS, being first duly sworn, declare and state:

I am an attorney licensed to practice law in the State of California.

I have engaged in the practice of law in the County of Sonoma continuously since January 1974.

I have been the attorney for Eva Isbell and Clevie and Omega Pearson since the inception of their action for declaratory relief against the County of Sonoma.

I am familiar with the system of indexes, registers and files in the Municipal Court of the County of Sonoma, and in the Superior Court of the County of Sonoma.

I have reviewed the contents of Sonoma County Municipal Court files No. 18465, *County of Sonoma v. Isbell,* and No. 16406, *County of Sonoma v. Pearson,* and I find each of the files to contain a single document captioned "Confession of Judgment." Copies of those documents are found at pages A-30 and A-31 of the Petition for Certiorari.

I have examined every case filed by the County of Sonoma in the Municipal Court of Sonoma County for the years 1974 through 1978. There has been no supplemental proceeding or action on judgment filed against defendants Isbell or Pearson.

Furthermore, examination of the Municipal Court filings by the County of Sonoma reveals that after the year 1974 the County of Sonoma has not filed a single action based on a confession of judgment.

I have examined the indexes and registers of the Superior Court of the County of Sonoma for the period of 1974 through 1978, and have found no case filed by the County of Sonoma as plaintiff which was based on a confession of judgment.

Executed in San Francisco, California this 10th day of October, 1978.

/s/ DAVID C. LEWIS
David C. Lewis

Subscribed and sworn to before me this 10th day of October, 1978.

(Seal) /s/ GLORIA HOWELL
Notary Public, County of San Francisco, State of California

Supreme Court, U. S.
FILED
SEP 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-440

COUNTY OF SONOMA, EUGENE D. WILLIAMS, individually and in his official capacity as County Clerk, MABEL TONKIN, individually and in her official capacity as Clerk of Municipal Court, HERB SNYDER, individually and in his official capacity as County Recorder, VICTOR MARTINEZ, individually and in his official capacity as Head of the Collections Department,
Petitioners

vs.

EVA ISBELL, CLEVIE PEARSON and OMEGA PEARSON,
Respondents

BRIEF OF AMICI CURIAE
The Carpenter Trust Funds for Northern California, in Support of County of Sonoma's Petition for Writ of Certiorari to the California Supreme Court

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September 28, 1978.

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OPINION BELOW

The opinion of the California Supreme Court is reported at 21 Cal.3d 61, *rehrg. denied as modified,* 21 Cal. 3d 561(a) (1978).

QUESTION PRESENTED

Whether the California Confession of Judgment Statute is violative of the Fourteenth Amendment of the United States Constitution on its face or as applied to the facts in this case.

INTEREST OF AMICI CURIAE, THE CARPENTER TRUST FUNDS FOR NORTHERN CALIFORNIA, IN THE CASE AT BAR

The Carpenter Trust Funds for Northern California[1] are express trust funds created under written agreement pursuant to Section 302 of the Labor Management Relations Act (29 U.S.C. §186), and they are multiemployer employee benefit plans under §§3 and 4 of the Employee Retirement Income Security Act (29 U.S.C. §§1002 and 1003). As multiemployer plans, the Carpenter Trust Funds deal with numerous contractors and are often involved with suits to collect fringe benefit contributions. In the past, the Carpenter Trust Funds have extensively relied on the California Confession of Judgment Statute. The abrogation of that statutory scheme by the California Supreme Court has had a profound effect on the collection of fringe benefits by the Funds.

[1]The four Carpenter Trust Funds for Northern California are Carpenters Health and Welfare Trust Fund for California, Carpenters Pension Trust Fund for Northern California, Carpenters Vacation and Holiday Trust Fund for Northern California and Carpenters Apprenticeship and Training Trust Fund for Northern California. These four Trust Funds shall be referred to as the Carpenter Trust Funds or Carpenter Trust Funds for Northern California.

In this brief amici curiae will explain the business situation in which it has used confessions of judgment. More generally, it will be shown that the confession of judgment procedure has important economic and social benefits to the entire construction industry including property owners, contractors and construction workers. These benefits are lost if a formal lawsuit procedure must be utilized or if the confession of judgment procedures become so complex and unsure as to make a formal lawsuit a more practical alternative.

In spite of recent trends in consumerism regarding confessed judgments, the California legislature has continued to provide for a confession of judgment procedure in non-consumer, i.e., commercial transactions. The legislature has determined that this procedure has a socially beneficial use in many areas including, in the construction industry. Amici's concern is that the overly-broad ruling by the California Supreme Court will preclude the existence of any satisfactory confession of judgment statute. In effect, the California Supreme Court has ruled that confessions of judgment violate Fourteenth Amendment Due Process. That result conflicts with the United States Supreme Court's holdings on this issue. Amici urge that certiorari be granted in this case to resolve this conflict which is and will continue to be detrimental to the construction industry in California and throughout the United States.

ARGUMENT

I

THE IMPORTANCE TO THE CARPENTER TRUST FUNDS THAT THERE EXIST A VIABLE CONFESSION OF JUDGMENT PROCEDURE.

The Carpenter Trust Funds for Northern California are multiemployer employee benefit plans that cover geographically about three-fourths of the State of California. Each month slightly over 20,000 carpenters have hours reported to the Trust Funds; there is a total of 28,000 employer accounts of which 5000 are active at any given time. Thus, the Carpenter Trust Funds deal with numerous employers spread over a large geographic area who on the average employ very few carpenters. In short, the small construction outfit is the "norm".

At any given moment there are on the average 2100 accounts that have outstanding amounts due or are otherwise in some state of delinquency. Because of the very nature of the construction industry in California those delinquent accounts tend to be the small employer. The large construction companies calculate fringe benefit contributions as they would any other necessary cost and allocate the burden of those contributions at the time of bidding. The small contractor does not have the economic power, financial strength nor community reputation to operate in this fashion. The small contractor must bid on a job and hope that his bid is sufficient to cover all costs, including fringe benefits, leaving him with a profit.

The construction industry in California, as in the rest of the United States, is one in which there is a small profit

margin in relation to the cash-flow requirements. Therefore, a small contractor without some excess financial backing can get into financial trouble on a project even if the amount of his bid is sufficient to cover expected costs and to make a profit. Moreover, one serious reversal on a single project can cause a healthy small-time contractor to slip to the edge of solvency.

Unlike many creditors of the small contractor, the Carpenter Trust Funds are in the long run as interested in seeing that the small contractors stay in business as they are in collecting past-due fringe benefit contributions on a particular job. This is because as long as a small contractor stays in business he is providing jobs for carpenters. A bankruptcy would destroy both jobs and fringe benefit contributions. Thus, the Funds' attempt to keep an even keel between the twin poles of allowing an employer to continue in business and obtaining payment of past-due fringe benefit contributions. To this end the California Confession of Judgment Statute was utilized.

For the period of January 1, 1977 through May 31, 1978 the Carpenter Trust Funds had 213 accounts with confessions of judgment. In eighty-two judgment has been satisfied. Thirty-two accounts are current, while ninety-four are in various states of delinquency or full write-off. In terms of amounts collected, payment on promissory notes secured by confessions of judgment amounted to $674,000 or approximately 82% of all amounts collected by means of legal action. Thus, promissory notes secured by confessions of judgment have proven to be a tool upon which the Carpenter Trust Funds have heavily relied.

II

THE USE OF A NORMAL LAWSUIT IS NOT A SATISFACTORY ALTERNATIVE TO THE CONFESSION OF JUDGMENT PROCEDURE.

There are two reasons why a normal lawsuit is an unsatisfactory alternative for the Carpenter Trust Funds to a confession of judgment procedure. First, lawsuits tend to precipitate the economic collapse of a contractor with the accompanying loss of jobs for carpenters who are the beneficiaries of the Carpenter Trust Funds. Second, the costs of preparing and filing a full lawsuit is in the aggregate an expensive proposition. This legal expense will, of necessity, either be passed on to new homeowners and other property owners or be absorbed by individual carpenters in the form of less actual fringe benefits.

With regard to precipitating economic collapse, as it was stated earlier, the Carpenter Trust Funds as creditors of the small contractor have a different perspective than most creditors. Most creditors are interested in maximizing their return on the potentially bad debt owed by a contractor even if it means forcing eventual economic collapse. This is because most creditors have no interest in seeing a particular contractor continue to exist as a on-going, viable business.

The Carpenter Trust Funds, on the other hand, cannot be blind to the fact that a contractor as a viable employer provides jobs for the beneficiaries of the Trust Funds. Even contractors who fall into insolvency and bankruptcy will often after several years re-enter the construction industry as contractors. Therefore, it is in the best interests of the Carpenter Trust Funds to avoid forcing an employer into economic collapse.

A confession of judgment creates very few repercussions even if that confession of judgment is filed with the court. This is because other creditors tend to view a confession of judgment as a manner of securing payment on a promissory note and not as a sign of loss of confidence in that contractor. A normal lawsuit, however, is a symbol that the plaintiff has lost confidence in the debtor's ability to pay. This psychological difference occurs regardless of whether the lawsuit contains exactly the same information that the confession of judgment would have contained.

Another problem with normal lawsuits is that a plaintiff, such as the Carpenter Trust Funds, must protect against splitting its causes of action and other technical problems of pleading. Before a lawsuit is filed, an attorney must review the facts of the case much more extensively than is necessary with a confession of judgment. He may be forced by legal necessity to include other claims against the contractor although it may be to everyone's benefit to allow those claims to drift for the time being.

A licensed contractor has a license bond, and for individual jobs he may have obtained a payment bond. In a full lawsuit these bonds will also be named as defendants. This carries immediate repercussions with regard to a contractor's future ability to obtain proper bonding for licenses and jobs. Likewise, if there is a possibility of a mechanic's lien to secure the payment of fringe benefits, in a close situation, without the ability to obtain a con-

fession of judgment there will be a greater tendency to file the lien.

The filing of a normal lawsuit triggers a chain reaction that a confession of judgment avoids. In a lawsuit, additional parties are named, and additional claims are made, perhaps merely to be safe. This creates a picture of greater economic distress than may actually exist. Other creditors get worried, and the end result is an insolvent contractor who no longer provides any jobs or fringe benefits.

A contractor who enters into a confession of judgment does so with full knowledge of the possible consequences. It is the result of his choosing a course of action that is optimum for his business. The contractor knows that defending a lawsuit is expensive, and that if monies are owing, it is far cheaper to negotiate a settlement secured by a confession of judgment than to litigate the matter. Also, most contractors would prefer to keep a continued rapport with the Carpenters' Union and to do so requires that they make some effort to accommodate the claims of the Carpenter Trust Funds.

The confession of judgment procedure had a definite use in the construction industry in California. It was a manner of securing a debt without causing unwanted repercussions or unwanted litigation costs. The absence of the confession of judgment scheme will have an adverse impact on the entire industry including on the Carpenter Trust Funds.

The second reason why the Carpenter Trust Funds need and use a confession of judgment statute is the

savings in costs. First, filing fees are measurably higher for a full lawsuit ($46.50 vs. $15.00 in Superior Court). Second, there are the additional costs of a commercial process server whereas an employee of the Carpenter Trust Funds can obtain the contractor's signature on a confession of judgment. Finally, there is a significant increase in the amount of attorney time required to file a lawsuit as opposed to drafting a confession of judgment. Thus, the total costs of filing suit, even if a contractor is willing to agree to a stipulated judgment, totals at least two hundred and fifty dollars. A confession of judgment entails approximately only $50 in costs.

As noted previously, the Carpenter Trust Funds from January 1, 1977 through May 31, 1978 handled 213 confessions of judgment. Using confessions in these 213 cases represents a savings of over $40,000.00. That savings in legal costs went to increasing the quality of benefits that the carpenters received from the Trust Funds and to reducing the costs of new construction. If there is no confession of judgment statute, someone will have to pay for that additional $40,000 of legal costs.

As a side note, the United States Supreme Court has expressed concern over the extent of litigation occurring in the American courts and the extensive involvement of attorneys in the everyday workings of society. The abrogation of the California Confession of Judgment Statute increases the burden on the courts as well as interjecting attorneys into situations where lay people can readily handle the matter. In the end this "due process" decision appears more as a "make-a-job-for a-lawyer" decision which in the case of the Carpenter Trust Funds means

less fringe benefits for more money and/or higher construction costs.

III

NO PRACTICAL CONFESSION OF JUDGMENT STATUTE CAN BE DRAFTED TO COMPLY WITH THE CALIFORNIA SUPREME COURT'S DECISION, AND THIS RESULT IS CONTRARY TO WHAT THE UNITED STATES SUPREME COURT HAS HELD TO BE REQUIRED UNDER MINIMUM STANDARDS OF DUE PROCESS.

A party may validly waive notice and opportunity to be heard without running afoul of Due Process. *D. H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972). To comply with due process and be valid the waiver must be voluntary, knowing and intelligent. *Id.* at 185-6. Thus, a confession of judgment statute complies with Due Process as long as it requires a valid waiver.

In the present case the California Supreme Court has paid lipservice to the *Overmeyer* decision while in fact holding, contrary to *Overmeyer,* that there can be no valid waiver of notice and opportunity to be heard consistent with Due Process. That result was achieved by stating that Due Process requires so much of a confession of judgment statute as to negate the possibility of drafting a workable statute that also complies with the decision.

It should be remembered that in abrogating the statutory scheme, the California court rejected a case-by-case approach, including an approach based upon the facts of the case before it. Instead it opted to hold that the statutory procedure on its face violated the Due Process

Clause of the Fourteenth Amendment. 21 Cal.3d 61, 64-65. It is because of this conflict between the California Supreme Court and the United States Supreme Court that the Writ of Certiorari should be granted.

In its decision the California court stated that in testing the validity of a confession of judgment a court may only rely on the document itself since there is no court hearing before a judge at the time the document is filed. 21 Cal.3d at 68. Next, it held that a confession of judgment document does not in itself demonstrate that the waiver was voluntary. *Id.* at 69. Finally, the court states that the debtor's signature on the document does not demonstrate that the waiver was knowing or intelligent. *Id.* at 70. Thus, without stating in so many words, the California Supreme Court holds that there must be a court hearing to validate the waiver. Possibly, the court may permit a waiver without hearing if it is accompanied by an affidavit showing that an attorney has been consulted. Under these requirements, it would be as easy or easier to obtain an agreed-upon consent judgment or default judgment as to obtain a confession of judgment. Furthermore, if the confession of judgment procedure becomes too complex or costly, then it is preferable to a creditor to file suit and obtain a consent judgment because it will be more insulated from post-judgment attack.

Implicit in the California Supreme Court's holding is that a creditor is prevented from relying on a valid out-of-court waiver by a debtor. This position offends our traditional notions of fair play and substantial justice. While due process may require that a waiver be demonstrably valid, due process also requires that a valid

waiver be binding. Also, the California Supreme Court held in its decision that confessions of judgment almost always involve a disparity in bargaining power. If such a disparity exists, then the waiver is not valid. *Id.* at 69. Creditors such as the Carpenter Trust Funds, under this holding, could never rely on even the most valid of valid waivers because inevitably they would be the "more powerful" parties. The concept of due process cannot require a result which clearly offends the most minimal notion of equal protection.

The California Supreme Court makes much out of the fact that any post-judgment remedies are too late because the existence of the judgment itself is harm to the debtor. Indeed, as this brief endeavors to point out, the mere filing of a lawsuit may result in harm. The possible harms in a given situation is a case-by-case concept, an approach which the California Supreme Court rejected in overturning the Confession of Judgment Statute.

In reaching its conclusion that available post-judgment relief in California is insufficient to comply with Due Process, the court relies on two points. First, the confession of judgment scheme had no requirement that a notice of entry of judgment be sent to the debtor's last known address. Thus, the California Supreme Court held that although a debtor has validly waived notice and opportunity to be heard he is still entitled to notice and opportunity to be heard. Due process does not require this Catch 22 position. Moreover, if the California Supreme Court truly felt that notice of entry of judgment would cure the defects in the scheme, it could have clearly so held. That would have resulted in an amendment to

the statute rather than a writ to the United States Supreme Court.

The second basis for rejecting post-judgment relief is that the scheme contained no procedure allowing a debtor to directly raise and litigate any defenses on the merits that he might have. Again, the California Supreme Court is indulging in circular semantics because a judgment by its very nature means finality. If every confession of judgment is subject to being re-litigated on the merits, then that judgment has no finality. Due process requires that once a valid waiver of notice and opportunity to be heard occurs, and judgment is taken against the person who made that waiver, that the judgment has as much finality as any other judgment. The California Supreme Court seems to be holding that creditors have no due process rights with regard to relying on the finality of a judgment.

CONCLUSION

It has been shown that the confession of judgment procedure is extremely important to these amici curiae and has important and valid uses in the construction industry in California. Under its *Overmyer* decision, the United States Supreme Court has held that consistent with due process there may be a valid confession of judgment statute. The California Supreme Court in the case at bar has held that Fourteenth Amendment Due Process effectively bars a practical confession of judgment procedure. Writ of Certiorari should be granted in this case to resolve this conflict between the California Supreme Court and the United States Supreme Court.

By granting certiorari the United States Supreme Court will have an opportunity to define more sharply what due process requires of a confession of judgment statute. This would have a positive effect not only in the most populous state in the Union, but also throughout the nation.

Respectfully submitted,

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